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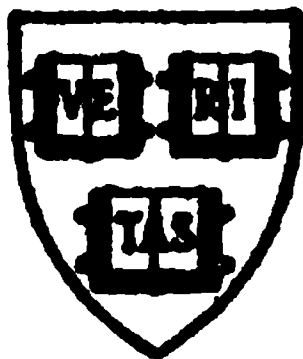
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LOUISIANA *p*
ANNUAL REPORTS.

July 7

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
LOUISIANA.

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J U D G E S
OF
THE SUPREME COURT.

HON. JOHN T. LUDELING, CHIEF JUSTICE.
HON. J. G. TALIAFERRO,
HON. R. K. HOWELL,
HON. W. G. WYLY,
HON. P. H. MORGAN.

ASSOCIATE JUSTICES.

A. P. FIELD, ATTORNEY GENERAL.



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ERRATA.

In the case of Gertrudiz Bonella and Caballero et als. *v.* Charles Maduel, Testamentary Executor, et al., page 112, the judgment in the Second District Court, parish of Orleans, was not delivered by Judge Tissot, who recused himself, but by Alfred Grima, selected to occupy the bench.

Page 119, State ex rel. Dixon, tutor, *v.* Judge of the Fifth District Court, parish of Orleans, the number of the case is 4975 instead of 4973.

No. 5067—Parish of East Feliciana ex rel. J. Oscar Howell, tax collector, *v.* John Gurth, page 140, it should have been mentioned that Judge Howell was recused in this case.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

JANUARY, 1874.

JUDGES OF THE COURT :

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO, HON. R. K. HOWELL, HON. W. G. WYLY, HON. P. H. MORGAN.	}	<i>Associate Justices.</i>
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3913.

HERMANN DANIEL et als. v. CITY OF NEW ORLEANS, PAGE & Co. et als.

According to the twenty-fourth section of the present charter of the city of New Orleans, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said petitioners by a written petition addressed to the Council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into in accordance with said petition, to make the banquettes which they were legally bound to make.

The evidence showing that the work was well done and that the price charged was reasonable, it would be repugnant to every principle of law and equity, to permit the plaintiffs to enrich themselves at the expense of others.

The law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved, and in whose front the banquetting is to be made.

The constitutional objection to the twenty-fourth section of the city charter, on the alleged ground that it imposes a tax which is not equal and uniform, is not well taken. The court does not understand that any tax is imposed by said section, in the technical sense of the word. It merely requires each proprietor to pay for his banquettes, and authorizes them to indicate when the banquettes shall be made and the character thereof; and, in doing this, the Legislature does not violate any provision of the constitution.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. A. N., A. H. and W. P. Ogden*, for plaintiffs and appellees. *Roselius & Alfred Philips*, for Page & Co., defendants and appellants. *George S. Lacey*, city attorney, for the city.

LUDELING, C. J. This suit was instituted by some of the owners of property fronting on St. Charles avenue, between Toledano and State

streets, to annul a resolution of the Common Council of New Orleans, passed on the eighth of November 1870, and the contract entered into in pursuance thereof with Page & Co., for laying Byrne's Improved Concrete Banquetting, on the north side of St. Charles avenue, between State and Toledano streets, for the price of one dollar per square yard.

The grounds on which this nullity is claimed, are stated in the petition as follows: "That by the express provisions of the charter of said city, approved March 16, 1870, and particularly of sections twenty-three and twenty-four of that charter, it is required that contracts for the purposes specified in the above agreement with said Page & Co., when they exceed five hundred dollars shall be made at public auction, and to the lowest bidder who can furnish satisfactory security, or that said contract shall be given to the person making the lowest sealed proposal therefor, and who can furnish satisfactory security to the council.

Second—The Byrne's Improved Concrete Banquetting is a patented improvement, and a resolution of the common council directing the contract to be sold to the patentee of said improvement necessarily excludes all competition.

Third—That the mayor in making his contract with Page & Co., exceeded his authority when he undertook to bind the front proprietors on the north side of St. Charles avenue separately from the other inhabitants of said city, for the whole expense of said work.

Fourth—That section twenty-four of the city charter upon which the right of the city depends in laying banquetting at the expense of front proprietors, is unconstitutional, as it provides for a tax which is not equal and uniform.

Fifth—That the petition of property owners upon which the action of the Common Council rests in this case is not signed by one-fourth of the owners of real property fronting upon said avenue, as required by law.

Page & Co. filed a general denial, and called the City of New Orleans in warranty.

The City of New Orleans answered the petition by the general issue, but filed no answer to the call in warranty.

By the twenty-fourth section of the present City Charter it is provided "that whenever one-fourth of the owners of real property fronting upon any unbanquetted street in the City of New Orleans shall, by petition signed by the petitioner, or petitioners, and addressed to the Council of said city, ask for the banquetting of said street, or for any portion thereof, setting forth the character and quality of said banquetting, said council shall cause said petition to be published in English in the official journal of said city, for and during four weeks;

and if, at the expiration of said publication so made of such petition, a majority of the owners of real property fronting on said street or streets, or said portion thereof, shall not, by memorial signed by the memorialist or memorialists, and addressed to said Council, object to the same, the said Council shall, by resolution or otherwise, order said banquetting to be made in accordance with lines and levels to be furnished by the City Surveyor; and the whole costs of said banquettes, so made, as aforesaid, shall be borne by the owner or owners, of real property, fronting on said banquettes, in equal proportions, according to the running foot frontage. And in the event of the owner or owners of any portion of said property so banquetted, refusing or neglecting to pay the proportion so due for more than sixty days, the same shall constitute a lien and privilege upon said property until the said sum so due shall be paid; provided, the proper proof of the due performance of the work is made before a competent Court, when the same shall be recorded in the office of the Recorder of Mortgages."

The evidence shows that these provisions were strictly observed. A petition signed by one-fourth of the proprietors of property fronting on St. Charles avenue, between Toledano and State streets, was presented to the council asking that "your honorable body will cause to be adjudicated a contract for the laying of Byrne's Improved Concrete Banquette on the north side of St. Charles avenue between the two streets before named."

On the eighth of November the Council adopted the following resolution: "Whereas, the proper legal time having expired and no legal objection having been made, and the petition having been published in the official journal for and during the time prescribed by law, therefore, be it resolved that the mayor be and he is hereby authorized and directed to enter into contract on behalf of the city, per notarial act before the city notary with Messrs. Page & Co. for laying Byrne's Improved Concrete Banquetting on the north side of St. Charles avenue, between State and Toledano streets, for the sum and price of one dollar per square yard, the said service being pursuant to request of petitioners."

According to the section above quoted, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said proprietors by a written petition addressed to the council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into, in accordance with said petition to make the banquettes, which they were legally bound to make. In consequence of their failure to object within the delay mentioned in the section above mentioned, a contract was entered into

by which work was done upon their sidewalks which they were obliged to have done under the existing laws. The evidence shows the work was well done and that the price charged was reasonable.

Under such a state of facts, it would be repugnant to every principle of law and equity to permit the plaintiffs to escape responsibility. They should not be permitted thus to enrich themselves at the expense of others. 5 N. S. 392. *Police Jury v. Hampton*, 2 An. 146; 12 An. 225; 2 R. 139; 4 An. 22.

We think the law, when it speaks of one-fourth of the proprietors, upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved. There can be no reason for supposing the law maker intended that either the assent of the owners, whose front had been already paved, or that of him, whose front it was not proposed to pave, should be had, but only the assent of those in whose front the banquetting was to be made. 23 An. 306.

It is not necessary to notice the constitutional objection to section twenty-four, urged on the ground that it imposes a tax which is not equal and uniform, further than to say, we do not understand that any tax is imposed by said section in the technical sense of the word. It requires each proprietor to pay for his banquette and it authorizes them to indicate when the banquettes shall be made and the character thereof, and in doing this, the legislature did not violate any provision of the constitution. 26 Ill. 357; 22 Ill. 574; 30 Mo. 541; 5 Ohio 243; 10 Ohio 159; 20 Johnson's Rep. 429; 23 Barb. 166; 11 An. 220, 338; 14 An. 505; 20 An. 497.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant, rejecting the plaintiffs' demand with costs of both courts.

WYLY, J., *dissenting*. Section twenty-three of the city charter provides: "That all contracts for public works, or for material or supplies ordered by the council, when the same exceeds five hundred dollars, shall be offered by the administrator of the department to which such contract pertains, at public auction, and given to the lowest bidder, who can furnish security satisfactory to the council, or the same shall, at the discretion of the council, be advertised for proposals to be delivered to the administrator of the department to which such contract pertains, in writing, sealed, and to be opened by said administrator in the presence of the Mayor and the Administrator of Finance, and given to the person making the lowest proposal therefor, who can furnish security satisfactory to the council."

Section twenty-four provides, in substance, that on the application of one-fourth of the owners of property fronting on any unbanquetted street, after due publication, and no opposition by the majority of property owners on said street, the City Council shall order said banquetting to be made in accordance with lines and levels to be furnished by the City Surveyor; "and the whole cost of said banquettes, so made, shall be borne by the owner or owners of real property fronting on said banquettes in equal proportions according to the running foot frontage."

Section twenty-three, it will be observed, provides the form for making all contracts for public works when they exceed five hundred dollars; and section twenty-four provides that the whole cost of banquetting shall be paid by the owners of property fronting on the banquettes whose construction the city has ordered after the publication of the petition of one-fourth of the property owners, and no opposition by the majority of property owners on said banquettes.

It is conceded that the amount of the contract in this case exceeds five hundred dollars. The question is, could the city, under the two sections of its charter referred to, make a contract with Page & Co. for banquetting the street in front of the property owned by the plaintiffs with Byrne's Improved Concrete Banquetting, a patent improvement owned by said contractors?

The plaintiffs insist that the resolution of the council directing the contract to be sold to said patentees necessarily excludes all competition; and, therefore, the contract is void because not made conformably to the requirements of section twenty-three, at public auction to the lowest bidder.

This was the precise question presented in the case of Burgess Bennett et al. v. The City of Jefferson, 21 An. 148, and there this court held that: The principle of competition enunciated by the statute must be observed by the council in letting out contracts for the improvement of the streets, otherwise the owners of property fronting on the streets improved can not be compelled to pay the charges assessed against them for making the improvement." The case at bar is covered by the case cited and in my opinion should have the same solution.

The defendants, however, insist that even though the contract was not made in conformity to section twenty-three of the charter, the work was for the benefit of plaintiffs and they are bound to pay for it, on the equitable principle that no one should enrich himself at the expense of another. This maxim has no application to the case at bar. There is no reconventional demand set up by the defendants; there is no claim as a *quantum meruit* before the court. The simple question is, shall the contract for laying Byrne's Improved Concrete Banquetting and the resolution of the City Council authorizing it be annulled, be-

cause they are in violation of section twenty-three of the charter, which requires all contracts for public works where the amount exceeds five hundred dollars, to be sold at public auction to the lowest bidder.

In the absence of the authority delegated in the charter, the city could not make a contract binding the plaintiffs to pay for the banquettes in front of their property. The law authorizing the contract imposes in section twenty-three of the charter the formalities that must be observed. Under the limitation, that all contracts for public works exceeding five hundred dollars must be made at auction to the lowest bidder, the law authorizes the city to contract for banquetting at the expense of the front proprietors.

As the contract in question was not adjudicated at public auction to the lowest bidder, it is obvious, the city had no authority to make it, and therefore it is not binding on the plaintiffs and should be annulled.

I therefore dissent in this case.

Rehearing refused.

No. 2900.

**B. M. HORRELL & Co. v. H. N. PARISH—LOUISIANA NATIONAL BANK,
Intervenor.**

A broker who acted for both parties in a transaction, and his son, who attended to the business at his office, were both competent to testify with regard to what passed between said parties, and to prove certain conversations and statements, to which a bill of exceptions was taken, on the ground that they were made out of the presence and hearing of the parties objecting thereto.

The court does not see why a man should not be allowed to testify in a civil matter, because his testimony may show that he has been guilty of an offense against the laws of the State. This is an objection which he alone could make.

When cotton is on board of a ship and under bills of lading when seized, it must be considered as under the control of the master of the ship, and the master holds it subject to the owners of the bills of lading—who are the intervenors in this case.

There is no validity in the allegation that the title of defendants is not complete, because the bill of lading is not perfect, inasmuch as when the bill calls for cotton "as marked in the margin," there are no such marks. There was nothing suspicious in the transaction, and the intervenors may be considered as sufficiently prudent when they treated on the pledge of the bill of lading.

A bill of lading is, after all, only the evidence of a contract to deliver property at a certain point, and it is not the marks on the margin therein, or on the property shipped, which give life to the obligation. The marks are given only for the convenience of identification. But in this case there is no question of identity.

Another fatal bar to plaintiffs' right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was recorded eight days after it was made, and two days after this suit was instituted. Therefore, plaintiffs had lost their privilege as to the intervenors.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. J. A. Rozier*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendant and appellant. *Lea, Finney & Miller*, for intervenor and appellant.

MORGAN, J. On the fourth February, 1870, Horrell & Co., through

Horrell & Co. v. Parish.

J. J. Browne, a broker, sold to Wilbur & Co., one hundred and twenty-seven bales of cotton. At the time of the sale, the cotton was stored in one of the presses of this city, and Horrell & Co. gave to Browne, the broker, an order on the press for the same. On the same day, Wilbur & Co. engaged room for one hundred and fifty bales cotton on the Weybossett, a steamer plying between this port and New York, for which Fosdick & Co. were the agents.

On the same day, Wilbur & Co. handed to Fosdick & Co. bills of lading for one hundred bales. Before signing the bills of lading, a member of the house of Fosdick & Co. called on Wilbur & Co.'s broker, who told him that he had purchased one hundred and twenty-seven bales for them, which he would receive and ship on that day, or the day after. Fosdick & Co. then signed the bills of lading for one hundred bales. The bills were signed at the countinghouse of Fosdick & Co. It is the custom, at this port, to sign bills of lading for property shipped on ocean steamers, at the office of their agents. There was some delay in sending the cotton to the ship, a member of the house of Fosdick & Co. declaring that from day to day he called upon the son of the broker through whom the sale was made, and who attended to the details of his father's business, and he was daily promised that the cotton would be sent. It was finally sent, and it was all on board the steamer, and stowed away on the ninth February; and was sent to the steamer under an order from Wilbur & Co.

On the fifth February, 1870, Wilbur & Co. drew their bill of exchange at ten days sight on Messrs. Williams, Black & Co. of New York, for \$9500. Attached to the bill of exchange was the bill of lading, dated the fourth February, signed by Fosdick & Co. for one hundred bales cotton. The bill was purchased by the Louisiana National Bank.

On the ninth February, 1870, Wilbur & Co. drew another bill of exchange on the same parties, at the same date, for \$4000. Attached to this bill of exchange was also another bill of lading signed by Fosdick & Co., agents of the Weybossett, for forty-five bales cotton. This bill was also purchased by the Louisiana National Bank. Both of these bills were sold to the bank in the ordinary course, and were purchased by the bank, according to the testimony of its President, on the security of the bills of lading which were attached to them.

On the tenth February, and after all the above described cotton was stored on the Weybossett, plaintiffs instituted this suit, and seized the same, alleging that the price therefor, \$13,379 28, had not been paid, and upon which they claim the vendor's privilege. Their privilege was recorded on the twelfth February.

Parish, the master of the Weybossett, answers and claims in recon-

vention \$323 63 for freight and charges on the cotton. The Louisiana National Bank intervenes and claims it under their bills of lading—the drafts to which they were attached not having been paid. The contest in reality is between Horrell & Co. and the bank; the one, as above stated, claiming the right to enforce the vendor's privilege upon the cotton; the other claiming it under their bills of lading. There was judgment in the district court for the plaintiffs. The defendant and the bank have appealed.

A bill of exceptions was taken on the trial to the ruling of the court permitting Rareshide to prove that J. J. & J. M. Browne made certain statements to him relative to the shipping of the one hundred and twenty-five bales cotton; and also to his being allowed to detail certain conversations held with them out of the presence of Horrell & Co. relative to the purchase of the cotton in question by Wilbur & Co. and the shipment of the same by Wilbur & Co., and other conversations and statements, on the ground that they were made and took place out of their presence or hearing, and that the said J. J. & J. M. Browne had no authority to bind them. They also objected to the ruling of the court which allowed the intervenors to establish by the same witnesses the circumstances attending the signing of the bills of lading by Fosdick & Co. before the cotton had been delivered to the ship, or put under her control, on the ground that the laws of the State make it a criminal offense for any master or agent of a ship to sign bills of lading before the delivery of the property to be shipped, and that no person guilty of such an offense can be permitted to testify thereto.

Browne was the broker who acted for both parties, and his son attended to the business of his office. They were both competent to testify with regard to the transactions between the parties. The objection went to their credibility and not to the admissibility of their evidence.

We do not see why a man should not be allowed to testify in a civil matter because his testimony may show that he had been guilty of an offense against the laws of the State. In our opinion this was an objection which he alone could make.

It is unquestionable that the cotton which forms the basis of this controversy was sold by Horrell & Co. to Wilbur & Co. on the fourth February. The sale was made through their common broker, to whom Horrell & Co. gave an order to the press where it was stored for the delivery of the same. Their title to the cotton passed from them when they gave the order for the same. The broker held for Wilbur & Co. It was theirs to dispose of. It could have been shipped by them through the broker at any time. The broker was repeatedly called

upon by the agents of the steamer to send it down to the vessel, and the broker as repeatedly promised to do so; the reason he gives for not having done so being that the weather was inclement, and it was finally shipped under that order. It is distinctly proved that the cotton was on the Weybossett, under the bills of lading when it was seized. It was then under the control of the master of the ship, and the master held it subject to the owners of the bills of lading. See the case of the Thames, 14 Wallace, pp. 98-106, and the cases there referred to.

Under this state of facts we think the case is covered, in principle, by the case of Delgado & Co. v. Wilbur & Co., lately decided. 25 An. 82. It differs from Delgado's case in this, that whereas, in the Delgado case, the seizure was made the day following the sale; in this case, it was not made for six days after.

It has been suggested that it would be inconvenient and hazardous for cotton buyers to be compelled to withdraw their funds from the banks and to pay for cotton which they purchase as the bales pass the scales and are delivered. We do not say that this process is necessary, nor do we see why it should be. At all events, the "inconvenient" argument has no law to support it. If it could be listened to at all, it might, we think, be applied with peculiar force in favor of these intervenors, and those who are pursuing the same business, against the plaintiffs. As we have before seen, Horrell & Co. sold to Wilbur & Co. one hundred and twenty-five bales cotton on the fourth February. The terms of sale were cash. On the same day Horrell & Co. gave to their common broker an order for the cotton, and on this order it was delivered to Wilbur & Co. The intervenors, on the faith of the bills of lading, advanced the value of the cotton to their holder, and the bills were transferred to him. On the tenth of February, six days after the sale, and after the cotton was on shipboard, the cotton was seized, because the price for which it was sold had not been paid. No requirement seems to have been made for the payment of the money from Wilbur & Co. when this cash sale was made, prior to delivery, no demand was made on them for it, or for any part of it; no tender was ever made of any sum in payment therefor until the ninth. On that day, Wilbur & Co. gave their check for \$8000—not \$13,379, the price of the cotton; this check was not certified by the bank upon which it was drawn; it was not presented for payment until the following day, about ten o'clock in the morning; there is no evidence in the record to show that if it had been presented on the day it was drawn it would not have been paid. It is established that it was not paid on the following day, because Wilbur & Co. had no funds in the bank upon which the check was drawn, and that their account was already overdrawn. But it does not appear when it was overdrawn,

and it is neither impossible nor improbable that it was overdrawn on the morning after and not on the day before the check was presented. At all events, these are matters of fact which were under the control of the plaintiffs, and about which there is nothing in the record. They sold for cash, and delivered their property without having received any cash; days elapsed after the sale, and they made no demand for the price; a check for part of the price was sent to them, which they accepted; the check was not even certified to be good by the bank upon which it was drawn, and it was not presented for payment until the day after its date. In the meanwhile the intervenors had paid their money upon bills of lading which represented that the property was in the possession of the purchaser. Under these circumstances, who can say that Horrell & Co., if they suffer, do not suffer from their own negligence? And who can say that if the intervenors suffer, it will not be because of Horrell & Co.'s negligence? To decide the case in favor of Horrell & Co. would be to hamper operations in commerce with almost prohibitory inconveniences. When a bill of exchange, drawn on a bill of lading, is presented to a bank, or dealer in exchange, the bank or dealer would have, first to send to the vessel on which the property is said to have been shipped, and find out whether or not it was aboard; second, satisfied in this regard, he would then have to find out whether the property had really been delivered to the shipper; third, satisfied here, he would have to find out who sold the property; and, if it were cotton, and a large lot, and had been bought from various parties, the vendors would all have to be brought up, and it would have to be ascertained whether, in reality, they had made the sales imputed to them; fourth, this ascertained, he would have to find out whether the property sold had been paid for, and if not paid for when the sale was made, when possession was acquired, in order to determine when the vendor's privilege attached and ended, and then search the recorder's office to discover whether the privileges of the vendor had been recorded. How many transactions in exchange could be accomplished in a day if the sale of every bill involved the necessity of so much investigation? And all this, why? Because it is inconvenient for a purchaser to draw his money from the bank in which it is deposited, and pay for the property which he buys for cash, when it is sold to him. But the money has to be drawn from the bank by some one. Why should it not be done by the buyer as well as by the seller. In this way the transaction is easy and complete. No one is inconvenienced even, and no one is harmed; not the purchaser, for he has paid his money; not the vendor, for his property has been paid for; not the buyer of the bill drawn upon the property and attached to a bill of lading therefor, for the property is represented by the bill,

and is free to go forward to its destination. To give this case to the plaintiff, is to place dealers in exchange at the mercy of every speculator who has the appearance of thrift, and the capacity to purchase apparently for cash, while in reality he is purchasing on credit.

It has been contended that the title to the bank is not complete, because the bill of lading is not perfect. The alleged deficiency is that while the bill calls for cotton "as marked in the margin," there are no marks in the margin. They rely principally upon the testimony of W. S. Pike and Alex. Brother to establish the fact that if the marks are not inserted in the bill of lading, it is out of the usual course of business. These witnesses do say so. But they say further: "If the bills of lading came through a respectable channel, I should not consider the omissions of the marks as more than a clerical error, though not in the usual course, if everything else seemed fair. I should not on account of the omission of the marks, decline the bills, especially if one of the bills of lading was marked." Now, there was nothing suspicious about the transaction connected with these bills. They were negotiated through a broker against whose standing nothing has been alleged; they were purchased in the usual manner and for a valuable consideration; they were drawn by a house in good reputation and credit, the best evidence of which is that plaintiffs allowed days to elapse without making a demand for the price of the property which they had sold them for cash. Indeed they never made a demand for the price of the sale. Days after it was made, they received a check as cash in part payment of the price, and the probability is that if the check had been paid on presentation, the cotton would have been at sea before any demand would have been made. If Horrell & Co. considered it safe to deal with Wilbur & Co. without exacting any security whatever, the Louisiana National Bank may be considered as having been sufficiently prudent when they treated with them on the pledge of a bill of lading. Besides, a bill of lading is, after all, only the evidence of a contract to deliver property at a certain point; and it is not the marks on the margin thereon, or on the property shipped, which gives life to the obligation. The marks are given merely for the convenience of identification. It could not be seriously contended that, if I ship one hundred bales of cotton on a vessel, the bales not being marked, or, if marked, the marks not being mentioned in the bill of lading, the vessel on arriving at her port of destination could not be compelled to deliver my cotton, simply because the marks were not described in the margin of a bill of lading. Everything shipped on a vessel is covered by a bill of lading; and if everything so shipped had to be marked, and the marks had to be noted in the margin of the bill of lading, in order to entitle the party who shipped it, or to whom it

was shipped, to obtain possession of it when it reached its destination, how would it be with reference to a cargo of coal or a cargo of salt? But there is no question of identity here. No one pretends that the cotton seized is not the cotton sold by Horrell & Co. to Wilbur & Co.; that it is not the cotton shipped on the Weybossett, or that it is not the cotton which is represented in the bills of lading upon the faith of which the bank purchased Wilbur & Co.'s bill of exchange.

Another fatal bar to plaintiffs' right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was made on the fourth of February; it was not recorded until the twelfth, eight days after the sale, and two days after this suit was instituted. Counsel admit, that, upon this point, the decisions of this court are in favor of the intervenors, "in cases of ordinary privileges;" but he contends that these decisions should not govern this case. The cases in which the decisions he refers to occurred were carefully considered, and the result arrived at after deliberate consideration and reflection. We then believed them to be a correct application of the law, and our minds now are the same that they were then.

It is urged that the interpretation we placed on the law is contrary to the custom and to the understanding of the bench and the bar for a long series of years. So far as we know of the opinions of the bench they are the other way. So far as the bar is concerned, their approbation of the correctness of our decisions is of consequence to us, although we should be obliged to decide against them, although they might be unanimous in their opinion against us. Custom, too, is to be considered, and we would be loth to disturb any practice which had become almost a part of the law itself. But inasmuch as the constitution under which privileges are required to be recorded in 1870, assuming the custom to be as they stated, we do not think it is so protected by the crust of antiquity as to make our breaking it a judicial sacrilege. But, in our opinion, the law has only been followed in the decisions complained of, and although no mere custom could have possibly affected the decision in those cases, no custom has been shown to have been changed by them.

In a pecuniary point of view the matter in dispute here is comparatively small, but the importance of the questions involved is of great moment to this essentially commercial community. It is for this reason that we have considered them so much in detail. The prosperity of a people depends upon their commerce, their agriculture or their manufactures. It is when they combine the three that they become powerful, and it is the excellence achieved in all these sources of wealth which has made this nation great amongst the greatest of the

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earth. Particularly are we of this city dependent upon commerce. It would be suicidal to hamper its transactions with onerous and useless requirements, and to throw obstacles in the way of its free pursuit. The prosperity of a people who, like ourselves, live by the sea, is commerce. Its actions should be as free as a due regard for the rights of the citizen will permit; as untrammelled, in so far as is possible, as are the waters upon which it floats, and as unconstrained as are the winds which drive it from shore to shore.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the Louisiana National Bank decreeing said bank to be entitled under their bill of lading to the one hundred and twenty-three bales of cotton in contest herein, and that they be put in possession of the same. The costs to be paid by appellees.

LUDELING, C. J. The plaintiffs claim a privilege to secure the price of the cotton sold by them. They did not record their privilege until after the institution of this suit. They, therefore, had lost their privilege when this suit was instituted, as to the intervenors.

Whether the sale was perfected when it was completed, it is unimportant to determine, for the plaintiffs allege a sale and claim a privilege to secure the price thereof. They are concluded by their judicial admissions.

I therefore think that the plaintiffs' demand should be rejected with costs.

HOWELL, J. I concur in the opinion of the Chief Justice.

WILY, J. I dissent both as to the proof of the facts and the law of this case.

Rehearing refused.

No. 3065.

GEORGE W. HUNTER v. THE SUN MUTUAL INSURANCE COMPANY, OF NEW ORLEANS.

The officer of a company must be presumed to know its by-laws adopted before his appointment, and is bound by them as to his tenure of office. They have become the law between himself and his employers. By one of their by-laws the defendants had reserved the right to remove their officers at pleasure. Plaintiff is an officer in the sense of the said by-law, and therefore can not complain.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Race, Foster & Merrick* and *E. N. Whittemore*, for plaintiff and appellee. *J. A. Maybin, Leovy & Monroe*, for defendant and appellant.

26	13
44	470

26	13
104	755

26	13
1122	932

Hunter v. The Sun Mutual Insurance Company of New Orleans.

MORGAN, J. Petitioner alleges that on the first December, 1868, he was employed as premium ledger book keeper by the defendants; that in February, 1869, the time fixed by the charter of the company for the election of the officers for the ensuing twelve months, he was engaged for one year at a salary of \$2500 per annum; that he served the company during all that year, and up to the first Monday in February, 1870, when he was re-engaged for another year, and that, without any cause, he was on the first April, 1870, dismissed. He sued for his salary for the balance of the year, and had judgment.

The ninth article of the by-laws of the company provides that "the tenure of all the officers of this corporation shall be during the pleasure of a majority of the board of directors, and at the first meeting of each new board an election shall be held for all officers of the company."

These by-laws were passed at least as early as the year 1866, before the plaintiff was employed by the defendants, and he must be presumed to have known them. We consider him to be an officer in the sense of the by-laws. He therefore knew the precarious tenure by which he held his position. The directors had the right to remove him at their pleasure, and having done so he has no claim against the company. It is admitted that he discharged his duties faithfully, and several witnesses, some in the employ of the defendants, say that when continued at the commencement of the year they consider themselves employed for the whole year. But other witnesses testify the other way. Under these circumstances we can not say that the plaintiff has established the evidence of any custom which would entitle him to be paid as he claims to be, and if he had we do not see how he could claim the benefit of it in the face of the article of the by-laws which we have quoted, and which is the law between himself and the defendants.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

WYLY, J., *dissenting*.

Rehearing refused.

No. 4785.

MARCO GIOVANOVIH v. CITIZENS' BANK OF LOUISIANA.

Plaintiff claims to be the owner of certain notes which were placed by his agent into the hands of Ducros, a broker, to be sold by him, and which he avers that Ducros illegally pledged to the defendant as security for a debt of his own.

That Ducros owed the Bank when the notes were put in its possession can not be disputed; that they were given to secure its indebtedness is established; and that the Bank had the right to receive them, is equally clear. The lawful possession of the notes by Ducros can not be questioned. Being the lawful possessor, he was, as to third parties, the owner. Being the apparent owner, he could dispose of them; if he saw fit to place them in the hands of the Bank in extinction of, or as a security for, a lawful debt, the Bank had the right to receive them, and they must remain with the Bank until its debt is paid. The responsibility is from Ducros to his principal; and not from the Bank to the party who claims that Ducros cheated him.

The burden of proof was on the plaintiff to prove, as he alleged, that the Bank gave no valuable consideration for the notes; that it is not the *bona fide* holder thereof; and that they came into the possession of the Bank in an illegal and unlawful manner. There was nothing in the transaction beyond the taking by the Bank of security for the payment of a pre-existing debt, and this it was authorized by law to do.

A PPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. Johnson & Denis, for plaintiff and appellee. *A. Pitot*, for defendant and appellant.

MORGAN, J. Ducros was a broker and a dealer in notes and stocks in this city, where he had business transactions with several of the banks. His operations appear to have been large. His account with the Citizens' Bank alone, for the month of February, 1873, exceeded \$90,000. In that bank, he had a note falling due on the first of March, 1873, for \$8000. The payment of this note was secured by the pledge of several other notes, as follows:

Mortgage note of J. Cazabene.....	\$2,000
Mortgage note of J. Cazabene.....	1,000
Mortgage note of M. Lopez.....	1,000
Mortgage note of M. Lopez.....	1,100
Mortgage note of M. Lopez.....	1,136
Mortgage note of Marmiche.....	5,000
	<hr/>
	\$11,230

He lacked \$3538 93, to the credit of his account to make up the sum required for the payment of his note. He was authorized by the bank to overdraw his account, leaving still in the possession of the bank the pledged notes.

The bank is in the habit of making call loans. In these loans no note is given to the borrower; the bank either gives a check or permits the borrower to overdraw his account on depositing securities. With these securities in the possession of the bank, Ducros was permitted to overdraw his account on March 1, \$3538 93, on the third of March, \$1729 25, and on the fourth of March, \$5000. Thus, on that

date, he was indebted to the bank, for what the bank terms call loans \$10,268 18. The margin of the bank's security was therefore \$962.

On the seventh of March, Ducros withdrew the pledged notes from the bank, through his clerk, telling the defendant that he intended to sell them and, with the money received, to settle his account. Ducros had been for many years a broker, and possessed the confidence of the community. The debt to the bank was not paid. The cashier called upon him either to pay the amount due, or to return the securities. A short time afterwards he gave to the bank the following notes :

Note of A. Lopez for.....	\$1,000
Note of A. Lopez for.....	1,100
Note of A. Lopez for.....	1,136
Note of Mrs. Giordano for	4,000
Note of Mrs. Giordano for	4,000
Note of Mrs. Giordano for	4,000
Note of Marmiche for	5,000
Total.....	<u>\$20,236</u>

And there the matter seems to have rested for some two or three weeks, when Ducros disappeared. Thereupon the bank instituted suit against him claiming the amount due (\$10,018 18), alleging that the sum due was on called loans, averring that the notes above described were held by it as a pledge to secure the payment thereof, asking judgment against Ducros, and praying that the notes be sold and that it be paid out of the proceeds. The suit was instituted on the first of May, 1873. What disposition was made of it does not appear.

On the sixth of May, 1873, the present suit was instituted. Plaintiff claims that he is the owner of the three Giordano notes for \$4000 each. He alleges that these notes, on or about the first of April, 1873, were in the possession of Dominique Bouligny, his agent; that Bouligny, acting for petitioner, placed them in the hands of Ducros with instructions to sell them for his account; that Ducros has failed to account either to Bouligny or to himself for their proceeds; that the notes are in the Citizens' Bank; that the bank gave no valuable consideration for them, and is not the bona fide holder thereof; that they came into its possession in an illegal and unlawful manner, and detains them without any right or justice. He prays that the notes be decreed to belong to him, and for their delivery. There was judgment in his favor, and the bank has appealed.

The judgment is wrong.

Plaintiff admits the general rule of law to be, in respect to negotiable paper, that the holder is presumed to have acquired it in the usual course of business and for value, and that the burden of proof

is on the party impeaching his title. But, quoting the words of Edwards (p. 292), he claims that "the party in possession of a negotiable instrument is *prima facie* the owner of it; but as soon as it is shown to have been lost or stolen from the true owner, the presumption is changed, and he must then show not only what consideration he gave for it, but also that he took the paper in good faith, in the ordinary course of business." And he contends, under this authority, that the plaintiff having proved that the notes belonged to him, that he placed them for sale in the hands of Ducros, and that the latter fraudulently dealt with them, it remains for the bank to establish that it took them in the usual course of business, and gave a full and valuable consideration for them.

But the notes in question were not lost; they were placed by the plaintiff in the hands of his agent for sale. They were not stolen; they were given by this agent to Ducros to be disposed of. He could have done with them almost as he pleased. Certainly he could have sold them, as it was for this purpose they were placed in his hands, and if, after having sold them, he had embezzled the money which he had received for them, the innocent purchaser's title would be good.

That Ducros owed the bank when the notes were put in its possession is not disputed; that they were given to secure this indebtedness is established, and that the bank had the right to receive them we think equally clear. The lawful possession of the notes by Ducros can not be disputed. Being the lawful possessor, he was, as to third parties, the owner; being the apparent owner, he could dispose of them; if he saw fit to place them in the hands of the bank in extinction of or as security for a lawful debt, the bank had the right to receive them, and they must remain with the bank until its debt is paid. The responsibility is from Ducros to his principal, and not from the bank to the party who claims that Ducros cheated him.

In *Swift v. Tyson*, 16 Peters, p. 1-19, the Supreme Court of the United States said:

"We have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration before it becomes due, we are prepared to say, that receiving it in payment of or as security for a pre-existing debt, is according to the known and usual course of trade and business. And why upon principle should not a pre-exist-

ing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper can not be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts. * * * We entertain no doubt that a bona fide holder, for a pre-existing debt, of a negotiable instrument is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities."

It will be seen that one of the cases used as illustration in the foregoing extract is the case now under consideration. But plaintiff contends that Mr. Justice Catron refused to concur in the portion of the opinion which has just been quoted, because the decision of the case did not require it, and he contends that in the case of *Goodman v. Simmons*, 20 Howard 343, the same court intimated very clearly that such doctrine formed no part as yet of the jurisprudence of the country. But turning to that decision we find the following:

"A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in *Swift v. Tyson*, 16 Peters p. 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now

repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity."

He contends, further, that *Swift v. Tyson* was a case of payment and not of pledge or security. But we do not see how this can help him. The greater includes the lesser. If Ducros' debt was a valid one, and the notes were in his possession, he could have sold them to a third party and appropriated the proceeds to the payment of the bank's debt, or he could have sold them to the bank. Surely if he could sell them, and thus destroy the real owner's title entirely, he could pledge them, and thus enable the owner to redeem them, if he saw fit, and save whatever balance might remain between the amount for which they were pledged and the amount of the notes.

He contends, further, that defendants do not come under the case in *16 Peters*, because the bank in receiving the notes granted no extension of time to Ducros, and forebore from no proceedings against him, as a few days later it was bringing suit and asking judgment against him. But in another part of his argument he says that if Ducros' account was overdrawn the bank should have prosecuted him, or at least have exposed him. We do not see how a bank can prosecute a depositor who has overdrawn his account, when the account was overdrawn with its consent; and its interest was to get its debt secured, not to expose its debtor. He was a mere ordinary debtor, and exposure would have shown an indebtedness, incurred with the consent of the bank, and nothing more. The bank could have reclaimed the pledged notes which they had intrusted to him, and this it did, and got them nearly all back, and others beside, among them those now in suit. It could, it is true, have pursued him at once for debt, but this it had no object in doing, as it was secured, and forbearing to sue was a consideration for the pledge. Suit was only brought after Ducros, the pledgeor, had disappeared, and when it was absolutely necessary to protect its rights.

It having been established that Ducros owed the bank, and that the notes were given to secure the payment of his debt, the burden of proof was on the plaintiff to establish the allegations of his petition, upon the truth of which alone he could recover: that the bank gave no valuable consideration for them, and is not a bona fide holder, and that they came into its possession in an illegal and unlawful manner. This affirmative, which he holds, he has not established by the evidence. We see nothing in the transaction of the bank except the

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taking security for the payment of a pre-existing debt, and this we think it was authorized by law to do.

It is urged upon us that the bank indulged Ducros by allowing him too long a time in which to pay his debt. But so long as the bank was secured, we suppose time was a matter of small consequence to it. But if the plaintiff suffers from the indulgence of the bank to Ducros, he suffers to a much greater degree from the indulgence of his own agent. The notes were given to him for negotiation about the first April. The agent says: "I saw Mr. Ducros several times afterwards, and he told me that he had not sold them yet. I then claimed the notes from him, telling him that I did not want them sold, and to return them to me. He said that the notes were in his bank box, and that as soon as his clerk would come he would send them to my office. The last time I saw him was on the twenty-eighth April. He repeated to me the same thing, and said that in half an hour the notes would be at my office." This was the day upon which he says Ducros disappeared. It certainly was no greater indulgence on the part of the bank to Ducros to allow the debt against him to stand, secured as it was by abundant collaterals, than it was negligence on the part of the agent to allow them to remain so long in his hands after having demanded them of them, and after he had promised to return them immediately. We think the reason for the one, as for the other, is to be found in the fact that the bank considered itself entirely secured, and that both the bank and the agent had entire confidence in the man whom they both trusted, and who, the agent says, "enjoyed the confidence of all the people."

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that plaintiff's demand be rejected with costs.

WYLY, J., *dissenting*.

Rehearing refused.

No. 4908.

JOSIAH FISK v. POLICE JURY, PARISH OF JEFFERSON, Left Bank.

This case is not one in which the district attorney, acting as parish attorney, can claim under section 2761 R. S., "a fee of five per cent. on the amount, for defending" the said suit, as no amount was claimed or actually involved therein.

It is manifest that the above mentioned section contemplates some services to be rendered for which the salary—the minimum of which is fixed—should be a compensation, and it provides only for commissions when there is a suit by or against the parish for an amount on which the commissions can be assessed.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
 Pardee, J. Josiah Fisk, in propria persona, and John Ray, for

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plaintiff and appellant. *William Mithoff, Jr.*, for defendant and appellee.

HOWELL, J. The plaintiff claims his salary for a year and a half and also four per cent. commissions for his services as district attorney, *pro tempore*, in the case of "*The State ex rel. A. Bonnabel v. the Police Jury, parish of Jefferson, left bank,*" by mandamus to compel the police jury to cause the construction of a shell road, which the relator therein alleged he had, as a citizen, an interest in having constructed. The plaintiff bases his right to the five per cent. commissions on the following clause of section 2761 R. S. The district attorneys shall represent the parish for which they are appointed "in any case in which such parish may be interested, and perform such duties as attorneys for the benefit of such parish as may be required by the police jury; they shall be paid by such parish a salary of not less than one hundred dollars (\$100) per annum, and as much more as the police jury may fix, out of the treasury of such parish, quarterly, on their own warrant, and the further sum of five per cent. commission on any amount they may recover in any suit in favor of such parish, and a fee of five per cent. on the amount for defending any suit in which said parish is defendant, to be paid by the parish."

The question is, whether or not the plaintiff is entitled to commissions, under the above law, for defending the parish in the above mandamus suit.

There was no amount claimed by the relator in said proceeding, nor could the parish be condemned therein to pay any amount. The only matter in controversy was, whether it was the duty of the police jury under the provisions of the law authorizing the construction of the shell road, to begin the proceedings and take the steps necessary for the construction thereof, and that question was presented by a citizen alleging that he had an interest in having the road made. It was decided in the district court, and the decision affirmed on appeal, that under the law invoked the police jury had a discretion and could not be compelled by mandamus to have the road constructed.

We think the case is not one in which the parish attorney can claim "a fee of five per cent. on the amount for defending" the said suit, no amount being claimed or actually involved therein.

It is manifest that the above law contemplates some services to be rendered for which the salary, the minimum amount of which is fixed, should be a compensation, and it prescribes only for commissions when there is a suit by or against the parish for an amount on which the commissions can be assessed. In all other suits and for all other professional services the annual salary is to be the compensation. If the salary fixed in this instance is too small, we can not remedy it by a

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construction of the law, of which we do not think it susceptible. The construction contended for by plaintiff would enable him to claim a commission of five per cent. in every suit in which the parish is a party, and every professional advice given the police jury, upon showing that an ultimate money liability might be the result of such suit or the matter in which the advice is given.

We think the judgment of the court *a qua* for the salary due plaintiff is correct.

Judgment affirmed.

Rehearing refused.

No. 4623.

CHAFFRAIX & AGAR v. W. P. HARPER, Sheriff, and D. & J. D. EDWARDS.

The material facts in this case are as follows: The plaintiffs were, in 1871 and 1872, the commission merchants and factors of Wilkinson, who owed them in April, 1872, about \$18,000 evidenced by two notes secured by mortgage, at which date their payment was extended to first of February, 1873. A pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873, to the amount of \$12,000, the planter obligating himself to ship the crop of that year and each subsequent year, if necessary, to pay the said sums with interest, and all commissions, expenses, etc. In December, 1872, the shipment in question was made of hog-heads of sugar and barrels of molasses, marked with the initials of plaintiffs, but without any special instructions from Wilkinson. The plaintiffs received the bill of lading early on the morning of the day of its arrival. A few hours afterwards, on the same day, the sheriff of the parish of Orleans, with a *fi. fa.* from the Parish of Plaquemines, in the suit of D. and J. D. Edwards v. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon the plaintiffs claiming the custody and control of the said property to the exclusion of Wilkinson's creditors and as exempt from seizure by them, took an injunction.

The court thinks that the property belonged to Wilkinson, the shipper, and that his creditors might seize, subject to the rights of the consignees to be settled contradictorily with the seizing creditors, inasmuch as the consignees were the agents of the shipper, and their constructive possession under the bill of lading, did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under the *fi. fa.*, or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances.

The injunction was not the remedy to which the plaintiffs were entitled. The sheriff should have proceeded with the sale, leaving the plaintiffs and defendants to settle their respective rights to the proceeds.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Gilmore & Sons*, for plaintiffs and appellees. *Hornor & Benedict*, for defendants and appellants.

HOWELL, J. The plaintiffs, commission merchants in New Orleans, and the factors of Dr. J. B. Wilkinson, a sugar planter in the parish of Plaquemines, injoin the sheriff and D. & J. D. Edwards, judgment creditors of said Wilkinson, from interfering with their possession and the sale and disposition by them of certain sugars and molasses shipped to them by said Wilkinson to be sold, and the net proceeds placed to the credit of said Wilkinson's account with plaintiffs, for supplies

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and advances made by them and secured by mortgage. The defendants plead a general denial, admit the seizure under their judgment of the property in question as the property of their debtor, deny that any special instructions were given in regard to the shipment thereof, allege that if plaintiffs have any claim against Wilkinson they are protected by their mortgage; further that plaintiffs, under cover of their injunction, have obtained possession of said property and sold it for their own benefit, and they pray that the injunction be dissolved and for judgment against plaintiffs and their surety *in solido* for the amount of their writ and damages.

From a judgment perpetuating the injunction the defendants have appealed.

The material facts are, that the plaintiffs were, in 1871 and 1872, the commission merchants and factors of J. B. Wilkinson, who owed them in April, 1872, about \$18,000, evidenced by two notes secured by mortgage, at which date their payment was extended to first February, 1873; a pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873 to the amount of \$12,000; the planter obligating himself to ship the crop of that year, and each subsequent year if necessary, to pay the said sums with interest and all commissions, expenses, etc., of shipment, sales, etc.; that in December, 1872, the shipment in question was made without any special instructions from the planter, the plaintiffs receiving the bill of lading early in the morning of the day of its arrival; a few hours afterwards, on the same day, the sheriff of Orleans with a *fieri facias* from the parish of Plaquemines, in the suit of D. & J. D. Edwards v. J. B. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon this injunction issued, the plaintiffs claiming the custody and control of said property to the exclusion of Wilkinson's creditors and as exempt from seizure by them.

We think the property belonged to Wilkinson, the shipper, and that his creditors might seize it, subject to the rights of the consignees to be settled contradictorily with the seizing creditors, inasmuch as the consignees were the agents of the shipper and their constructive possession under the bill of lading, did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under a *fi. fa.* or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances. C. P. 642.

Article 3247 (3214) C. C., gives a privilege to the consignee superior to the attaching creditor for any balance that may be due him, provided he has obtained possession or received a bill of lading. The language of

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this article plainly implies that the goods may be attached, and, as we have remarked above, a direct seizure by the sheriff may be made if he can take actual possession, the attachment not being exclusive of the direct seizure.

The conclusion seems to us to be clear that the injunction was not the remedy to which the plaintiffs were entitled, and that the sheriff should have proceeded with the rule, leaving to plaintiffs and defendants to settle their respective rights to the proceeds.

Although the common debtor is not before us, there is evidence sufficient in the record, including plaintiffs' account against him, to show that the right of the defendants to the proceeds of the property seized is superior to that of plaintiffs, who by their proceeding are liable, under the evidence, to the defendants for the amount thereof in their hands.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of D. & J. D. Edwards dissolving the injunction herein, and that they recover of plaintiffs and their surety, S. Cambon, *in solido*, the amount of the judgment against Dr. J. B. Wilkinson, enjoined herein, to wit: \$2551 12, with interest and costs therein allowed, not to exceed \$3800, the value of the property of said Wilkinson in the hands of plaintiffs as alleged by them. Costs of this suit in both courts to be paid by plaintiffs.

ON REHEARING.

HOWELL, J. The error which the plaintiffs' counsel make is in considering the bill of lading in this case as plaintiffs title to a special ownership of the property, and that the latter have a privilege for advances on the crop, of which the property seized was a part.

They can not hold both positions at the same time, that of owner and a creditor with privilege. They do not claim however as owners but as creditors with a privilege for advances, and we think the record shows that they had no privilege for the debt, which existed at the date of the seizure, and that the shipment was made without special instructions. They are merely the factors of the owner, with power to sell, and having no privilege and no special instructions, their possession of the bill of lading gave them only the possession and control necessary to make the sale, and until that was made, or special instructions had effect, their possession was, in law, the possession of the owner, whose creditors could seize the property subject, of course, to any preference in favor of all parties having a preference on the proceeds.

We can not assent to the proposition that the receipt by the factor or commission merchant, of a bill of lading in the ordinary course of business between planter and factor, without the existence of some

Chaffraix & Agar v. Harper, Sheriff, and D. & J. D. Edwards.

special privilege or effective instructions, will give the factor such control of the property shipped as to exempt it from the pursuit of the planters first creditor's.

The cases of *Felter v. Field*, 1 An. 83, and *Delgado v. Wilbur*, 25 An. 82, do not apply to this case.

It is therefore ordered that our former decree herein remain undisturbed.

MORGAN, J., *dissenting*. In the case of *Felter v. Field*, 1 An. 83, it was said: "Was the property sold by the plaintiffs in the possession of the defendants at the time of the attempt to enforce the vendor's privilege? It was on shipboard under a bill of lading. It was in the possession of the carrier who possessed it for the lawful holder of the bill of lading, who had the only symbol of ownership, and had the sole control of it and sole power of disposing of it. By putting the bill of lading in the postoffice the defendants parted with all control over it, for they addressed it to the consignees in whose favor the bill was made, and on whose signature the shipment was to be delivered. In no sense could the defendants be considered as being in the possession of the property after the shipment and transmission of the bill of lading towards its destination." The same doctrine was recognized by this court in the case of *Delgado v. Wilbur*, 25 An. 82.

These decisions rest upon what I understand to be the well recognized principles of the commercial law. It is based upon the doctrine that the bill of lading is the title to the property which it represents.

In this case Wilkinson, a debtor of plaintiffs, shipped to them a certain quantity of sugar and molasses. The sugar was marked with their initials. The bill of lading under which it was shipped declared that it was to be delivered to them or to their assigns, at New Orleans. The produce reached New Orleans. The bill of lading was delivered to plaintiffs. After the bill of lading was in their possession, the property was seized under a *feri facias*. I think the property was not liable to seizure. It was not in the possession of Wilkinson, nor was it under his control. Even had he sold it to Chaffraix & Agar on a credit, and they had failed before it had been delivered to them, he could only have prevented them from taking possession of it by stopping it *in transitu*. The assignment of the bill of lading by Chaffraix & Agar would have been good. As soon as the bill of lading reached their hands they could have sold the property which it represented; and this, because in law the possession of the bill of lading was their title to the property. If the legal title was in them, it could not be seized by Wilkinson's other creditors under a *feri facias*.

For these reasons, as well as for those given by the district judge, I think the judgment should be affirmed.

No. 4733.

SUCCESSION OF PIERRE MONETTE. On petition of JULIEN JOSEPH MONETTE praying to be recognized as sole heir and put in possession.

Plaintiff, after having accepted the benefit and *status* conferred upon him by Pierre Monette in the act of marriage which legitimated him, can not attack the act creating his own *status*, and under which he is asserting his rights, by questioning the validity of the same rights conferred upon one who is recognized as his brother and also legitimated in the same document. The very words which establish the legitimacy of plaintiff, establish also the *status* of the defendant. He can not accept the benefits of an act and repudiate its obligations.

APPEAL from the Second District Court, parish of Orleans. *Tisset, J. Charvet & Duplantier*, for plaintiff and appellant. *O. Morel and B. Fillet*, for defendant and appellee.

LUDWIG, C. J. The plaintiff, Joseph Julien Monette, alleges that he is the sole legitimate child of Pierre Monette and Louise Boulin, and that Edward Monette, who has been appointed administrator of the succession of Pierre Monette, is not a legitimate child of Pierre Monette. He alleges that the declaration of Pierre Monette and Louise Monette, his parents, in their act of marriage, to the effect that the said Edward Monette is their son, is false, and that the legitimation of the latter, sought to be effected thereby, is of no avail and void in law; that it was the result of gross ignorance, or a device resorted to for the purpose of depriving your petitioner of his just rights, as the only child and heir at law of the said Pierre and Louise Monette. He prays to be recognized as heir and to be put in possession of the estate.

The defendant filed several peremptory exceptions to the demand, which were sustained, and the plaintiff has appealed.

It will be necessary to notice only one of the exceptions. It is this: That after having accepted the benefit and *status* conferred upon him by Pierre and Louise Monette, the plaintiff can not attack the act creating his own *status*, and under which he is asserting his rights.

He has annexed to his petition as a part thereof the act, which, with the marriage, is his title. It contains the following clause: "Devant moi curé, et les mêmes témoins sous-signés, les sredits époux ont reconnu pour leurs enfants légitimes selon les lois, Julien Joseph Monette, âgé de 32 ans, et Edward Monette, âgé de 22 ans, les quels, aux mêmes titres, auront tous les droits, privilèges d'enfants légitimes devant Dieu et l'état." The plaintiff relies upon the marriage of his parents and this acknowledgment in the act of marriage to establish his legitimacy and his right to the estate, and yet he wishes to attack it. The very words which establish his legitimacy, establish also the *status* of the defendant. One can not be listened to by courts when he

 Succession of Monette.

attempts to prove the falsity of an act, under which alone he asserts a right. He can not accept its benefits and repudiate its obligations. "Il est de principe que les actes sont indivisibles dans leurs effets." Encyclopédie du Droit—verbo. acte.

See also the cases of Provost et Lallemand, c. Marie Liberté, in Palais Royal, vol. 10, p. 547, and Griffaulières v. Griffaulières, Palais Royal, vol. 24, p. 816.

If Joseph Julien Monette can attack the validity of the acknowledgment, so can Edward Monette, and the spectacle would be presented of adverse claimants claiming rights under the same act, and both attacking the truth of its representations. And as it is possible that each party might be able to prove that the other was not the child of both alleged parents, it might result that a suit would be prosecuted to final judgment, when neither party had a standing in court, for neither can question the act unless he be the heir of the parties to said act. If the acknowledgment be false as to one, what guarantee have we that it is not false as to the other? They are both acknowledged by the same stroke of the pen. The judgment of the lower court is correct.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs of appeal.

MORGAN, J., *dissenting*. I understand the decision of this case stands upon the declaration that plaintiff and defendant holding their status by virtue of the same act, neither can contest its validity.

I can not assent to this proposition. I think the act can be contested by any one in interest.

If these persons had been recognized as required by law at different times, I do not understand it to be held by the opinion of the majority of the court that either act could not have been contested by either of the parties. Any act containing different provisions may be part good and part bad. So the act which declares ten children to be the offspring of the same persons may be in part true and in part false. Those who have an interest in showing its falsity in any particular are, I think, entitled to do so.

The law prohibits adoption. The ruling of the court permits it in an indirect way.

The law prohibits the legitimating of adulterous bastards. The law permits the legitimating of a child, not an adulterous bastard, conceived by a woman between whom and the father no impediment to marriage existed at the time of conception. The acknowledgment may be made by public act before a notary public and two witnesses.

A man may make his by public act. Suppose in the act by which he makes his will he recognizes a child sprung from an adulterous connection, giving him the bulk of whatever fortune he may have, and instituting a collateral relation heir for the balance, would not the instituted heir be allowed to contest the acknowledged child's right upon the ground that he was an adulterous bastard, and consequently incapable of being legitimated? Suppose he has two illegitimate children, one of whom is adulterous and the other capable of being legitimated, and he attempts to legitimate them both, will he be permitted to do so because he has acknowledged them both in the same act? Can a man make his grandfather his child? Yes, if the opinion of the majority of the court be correct, provided he declares him so to be in the act by which he legitimates a natural child, for the same act which legitimates the child transposes the grandfather into a child. Their *status* is established by the same title, and can not, therefore, be disputed by either.

There are some acts and declarations which a man can not repudiate. But there are no cases in which he can not plead fraud, want of consideration, error, etc., to his acts or declarations. And I know of no case where a person, not a party to an act, can not set up that a declaration contained therein is not true.

Here it is alleged that a declaration in an act is false, and this declaration deprives a party of his rights. I am told that the party whose rights are destroyed by it can not contest it, because his claims rest upon a similar declaration with regard to himself. What will a woman who has lost her position not do to regain it? What sacrifice has she ever been called upon to make which she has not cheerfully submitted to, if it was to do tardy justice to herself and secure legitimation to her unfortunate child? Self-sacrificing in all things for those she loves; to her offspring tender, and of their interests jealous; of their good name sensitive, and, of all things, made most unhappy by any stain which she may have put upon their birth, what sacrifice will she not make to relieve them from the disgrace which a possibly censorious society places upon those who are brought into the world without the previous publication of bans, the license of the justice, the solemnization by the minister of God's Holy law? None, I believe. And so I can easily fancy how the declaration that both the children, whose legitimacy is now in question, are hers, was wrenched out of her in the act by which her own son was, as it were, given a new life too. The declaration may have been the *sine qua non* of the marriage. The man may have extorted it from her by a refusal to marry her without it. With her own position at stake, with the legitimation of her child dependent upon a word from her, she would have been more or less than

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woman if she had refused to say it. Her own wrongs righted, her own child's *status* fixed, it mattered nothing to her what other results followed from her declarations. She would have been true to her own offspring, and this was all she had at heart. Suppose this to have been the fact in this case, why should it not be established? I can see no reason and can find no law prohibiting it, and I am therefore constrained to dissent from the opinion of the majority of the court.

Rehearing refused.

No. 4710.

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COMMISSIONERS OF IMMIGRATION *v.* C. L. BRANDT et als.

The second section of the immigration law of the State, enacted March, 1869, and re-enacted in the Revised Statutes of 1870, section 1722, is not in conflict with the constitution of the United States, which gives to Congress the exclusive right to regulate commerce with foreign nations and among the several States and with the Indian tribes. The State law in question is not a regulation of commerce between foreign nations, but a police regulation which the State may properly adopt for the protection of its own citizens.

In regard to the bonds exacted by said immigration law, their execution can not be enforced, no penalty being prescribed for refusal to execute them.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Sam. R. & C. L. Walker*, for plaintiffs and appellants. *William H. Hunt, E. W. Huntington and Charles M. Emerson*, for defendants and appellees.

TALIAFERRO, J. The Commissioners of Immigration, a body duly incorporated by the laws of Louisiana, sue the defendants—master, owners and consignees of the North German steamship *Saxonia*, a foreign vessel plying between the ports of New Orleans and Hamburg—for the amount of penalty imposed for violation of the provisions of the second section of the act of March 8, 1869, and re-enacted, Revised Statutes, 1870, section 1722. By that section of the act it is made the duty of the master and commander of any vessel coming from any State of the United States other than the State of Louisiana, or from any foreign country, to make a report under oath to the Commissioners of Immigration or their agent, which shall contain the names, ages, nationalities, condition, description, etc., of every passenger landed at this port and coming from such other State or foreign country, within twenty-four hours after arrival in port, and in case of failure on the part of the master or commander to report according to law, a penalty of \$100 is imposed by the law in the case of each and every passenger landed and neglected to be reported.

The steamship *Saxonia*, Captain Brandt, arrived at the port of New Orleans on or about the fourth day of January, 1873, and landed one

hundred and sixty-four alien passengers, and failed to make the report required by law. It is established that the report which was furnished by the board of commissioners to the Saxonian was lodged in the Customhouse, and that the agent of the board obtained from the consignees, Williams, Rupperti & Co., an informal list, unsigned and not sworn to. The plaintiff further seeks in this action to compel the execution of the bonds required by the third section of said act (Revised Statutes of 1870, section 1723), by which the owners and consignees are required, in case they do not choose to commute within twenty-four hours by paying the sum therein stipulated, which bonds are required in order to secure the State, cities and parishes, that the immigrants will not become a burden upon the communities where they may remain.

To these demands the defendants oppose the following answer and exceptions: That the section of the act under which the plaintiff demands the bonds in question is merely directory, without sanction or penalty, and can not be enforced; that the exaction of said bonds is without cause or consideration, and in hostility to the inalienable rights of defendants, and therefore illegal and unconstitutional; that the said section conflicts with article 114 of the State constitution, because its object is not expressed in the title of the act; that the act of the Legislature under which these claims are set up against the defendants is repugnant to and violative of sections eight and ten of the first article of the constitution of the United States and to the laws of Congress made in pursuance thereof, and that on the same ground the required bonds are without force.

In the court below it was decided that the law requiring bonds is inoperative, as it affixes no penalty for a refusal to give them. The court did not pass upon the money demand, \$100 for each passenger not reported. The case was dismissed at plaintiffs' costs, and they have appealed.

In regard to the bonds we concur with the judge *a quo* that their execution can not be enforced, no penalty being prescribed for a refusal to execute them. 14 An. 207; 7 Rob. 219.

We regard the immigration law of the State as not being in conflict with the constitution of the United States, which gives to Congress the exclusive right "to regulate commerce with foreign nations and among the several States and with the Indian tribes." We consider the State law in question not as a regulation of commerce between foreign nations, but a police regulation which the State may properly adopt to prevent the introduction among its own citizens of a destitute and helpless class of foreign population, without some security or indemnity against persons of that class becoming a charge upon the

people of the State to maintain and support. That a State may make such a provision for the protection of its own citizens, we think well established. 7 Howard 523; 16 Peters 625; 5 Howard 471.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, so far as it declares the law requiring bonds to be furnished by the defendants inoperative, be confirmed, but in all other respects that it be annulled, avoided and reversed. It is further ordered that plaintiffs recover from the defendants the amount claimed as the penalty incurred by the defendants for not reporting, as required by law, the number of alien passengers brought into the State on board the steamship Saxon, on or about the fourth of January, 1873, viz: the sum of \$16,400 and all costs of suit.

Rehearing refused.

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No. 4742.

JAMES McCracken, Administrator, v. JAMES MADISON WELLS.

This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does not come under the exceptions contained in the 194th article of the Code of Practice.

More than a year having elapsed from the last payment of interest to the institution of this suit, the usurious payments which were expressly imputed by the parties to the interest can not now be recovered back, nor imputed to the capital.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. O. E. Schmidt*, for plaintiff and appellee; *W. B. Hyman, Bel-den & Foley*, for defendant and appellant.

MORGAN, J. Plaintiff obtained executory process upon a note which he holds as the administrator of Wm. McCracken's estate for \$5000, and caused the property mortgaged to secure the same to be seized. There is a credit on the note for \$500. The balance claimed to be due in principal and interest is \$4635 55 with interest at eight per cent. since the twenty-sixth April, 1872.

Defendant, proceeding by opposition, obtained an injunction without bond staying the execution of the suit on the grounds—

First—That the order of seizure and sale had issued for a greater sum than was due by him, inasmuch as he had paid \$2900 on account of plaintiff's claim, of which only \$500 were credited to him.

Second—That the pretended copy of mortgage offered in evidence by plaintiff is, on its face, an untrue and incorrect copy of the original mortgage.

Third—That plaintiff asked and obtained an order to sell defendant's property to pay costs to which he had no pretense of right. That the face of the papers show that time was given him to pay the claim sued on.

Plaintiff then took a rule on defendant to show cause on Tuesday, the eighteenth March, why the opposition should not be set aside on the grounds that the allegations contained therein were not true, and also why he should not pay \$500 damages for the wrongful obtaining of the injunction. On the eighteenth, defendant excepted to the proceeding by rule, because, first, the motion and rule are but an answer, and because it is contrary both to the rules of court and the provisions of law to try the case without fixing it for trial.

Second—Because if the case is to be tried summarily, it should have been fixed for trial on Monday instead of Tuesday, conformably to special rules of the court for the trial of summary cases.

Third—Because plaintiff by claiming damages, and by requiring defendant to show cause why rent shall not be seized does not confine himself to the questions to be tried summarily but asks for judgment on claims which are to be tried in an ordinary manner, and which entitles him to have the issue tried by a jury. Should these exceptions be overruled, then he asks for a continuance on account of the absence of a witness.

On the same day, but by a separate pleading, he asked leave to amend his defense by asking for a trial by jury, which was refused, to which refusal he took his bill of exceptions. The exceptions were overruled and the rule was thereupon continued to Monday the thirty-first March, on which day, on the affidavit of defendant's counsel, it was continued to Sunday, fifteenth April. It was then continued to the eighteenth. On the eighteenth, defendant reserved his bill to the ruling of the court ordering him to trial. The case was proceeded with and judgment was rendered in favor of the plaintiff for the amount claimed to be due on the note, and dismissing his claim for damages.

From this judgment defendant asked for a suspensive appeal, which was granted upon his furnishing bond in the sum of \$8500.

The alleged error in the copy of the act of mortgage is that the notary, after stating that the United States internal revenue tax is paid, added "canceled stamps for five dollars being annexed to the original act on file in my office," instead of saying "said stamps being hereto annexed." There is certainly nothing in this objection.

The cost which he claims he is illegally called upon to pay is one dollar claimed for the certificate of the inscription of the mortgage. This objection is covered by the case of *Weems v. Ventriss*, 14 An. 267.

The answer to his complaint that he was not allowed a trial by jury is, first, that the original suit was on a promissory note, and second, that it was an injunction, and that he was not entitled to a jury, not coming under the exceptions contained in the 494th article of the Code of Practice.

McCracken, Administrator, v. Wells.

The case was a summary one, and as such was entitled to a speedy trial. The rule to set aside the injunction was first fixed on Tuesday and then on Monday and afterward continued from time to time, the last time at the special instance of the appellant. This was a sufficient notice and sufficient compliance with the law.

The allegation that from the face of the papers it appears that time was given to pay the claim, is incorrect. The indorsements on the note show that it was renewed for one year from the twenty-sixth December, 1868, and again to twenty-fourth December, 1870, and again to twenty-fourth December, 1871. His letters from Alexandria of March 27, April 3, June 12, and September, 1872, acknowledge that the debt was due at their respective dates, and contain promises to settle it.

It does not appear that a greater rate of interest was contracted for than eight per cent. The note bears interest at that rate after maturity. The indorsements thereon as to the interest merely relate that the interest has been paid in advance up to the period to which payment was extended.

Neither is there any evidence in the record that he has ever paid on the principal of the note more than \$500, for which he has been given credit. The \$2900 which he claims to have paid, consist, outside of the \$500, of twenty per cent. original discount and twelve per cent. interest, all of which he says is usurious, and which he has a right to have credited on the amount remaining due. He is mistaken. More than a year elapsed from the last payment of interest to the institution of this suit.

"The usurious payments having been expressly imputed by the parties to the interest, can not now be recovered back, nor imputed to the capital, the plea of prescription having been filed." *Johnson v. Phillips*, 24 An. 156.

"The owner or discounter of any note or bond, or other written evidence of debt for the payment of money, payable to order or bearer by assignment, shall have the right to claim and recover the full amount of such note, bond or other written evidence of debt, and all interest not beyond eight per cent. per annum that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent. per annum interest or discount." C. C. 2924.

Plaintiff asks for damages. Under the circumstances of this case, we do not think the damages should be allowed.

Judgment affirmed.

Rehearing refused.

No. 4913.

FRANCIS C. MAHAN v. ACCOMMODATION BANK et als.

This is an injunction suit, in which the plaintiff alleges that the judgment under which execution issued is a nullity, on the ground that there is no legal corporation plaintiff therein, or owner thereof, such as the Accommodation Bank.

There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in the original suit. Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence it is *res judicata*.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. John Ray*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

TALIAFERRO, J. This is an injunction suit. Mahan, the plaintiff, was sued by the Accommodation Bank of Louisiana, the successor of the Louisiana Pledge Association, for \$4933. The bank obtained judgment against him, and issued execution thereon. In this suit, Mahan enjoins the execution, alleging that the judgment under which it issued is a nullity, on the ground that there is no legal corporation plaintiff therein or owner thereof. The original suit of the Accommodation Bank against Mahan is the one numbered 375, and the one in which judgment was obtained against him as above. That suit was filed twenty-third November, 1872. On the fifth of April, 1873, the Attorney General filed a suit in the name of the State to prohibit the Accommodation Bank from exercising corporate powers to which he alleged they are not entitled by law. The Accommodation Bank filed an exception on the sixteenth April, 1873, which was overruled, and judgment by default was rendered against the bank. Mahan sets forth that if upon the trial of this case of the State v. the Accommodation Bank, No. 2755, judgment should be rendered in favor of the State, the judgment against Mahan in case 375 would become absolutely null and void for the want of proper parties. In the suit now before this court, Mahan sets forth that execution is out against him, and unless restrained by injunction, his property under seizure by the sheriff and advertised for sale may be sold before the suit of the State v. the Accommodation Bank, No. 2755, can in the usual course of judicial proceedings be decided.

The defendant in injunction excepts that the petition for injunction sets forth no cause of action; that on the state of facts therein set out there is no legal right for an injunction shown. Defendant further pleads *res judicata*.

On hearing the rule filed by the defendant to dissolve the injunction with damages, it was overruled, as was also the plea of *res judicata*. The defendant appealed.

There is no principle better settled than that a party is not allowed

Mahan v. Accommodation Bank et als.

to arrest an execution on grounds that he might have set up in the original suit. Here the party taking out the injunction not only might have set up in the original suit against him, No. 375, that the Accommodation Bank was not legally incorporated, but he did do it. The judgment in that case became final. The appeal was dismissed and execution issued. It formed *res judicata*.

It is therefore ordered that the judgment of the lower court be annulled, avoided and reversed. It is further ordered that the injunction be dissolved, and that the defendant recover from the plaintiff in injunction and the surety on the injunction bond, jointly and severally, ten per cent. on the amount enjoined. It is further ordered that plaintiff pay costs of these proceedings.

Rehearing refused.

No. 4641.

SUCCESSION OF A. H. D'MEZA. On opposition of MYERS & LEVY to provisional tableau.

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46	1009
28	35
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A contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral not transferred or delivered in pursuance of said contract or promise.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Hays & New*, for opponents and appellants. *Trist & Olivier*, for executor and appellee.

WYLY, J. Myers & Levy opposed the homologation of the provisional account and tableau filed by the testamentary executor of A. H. D'Meza on the ground that they were not ranked as privilege creditors, but were placed as ordinary creditors on the tableau, and from the judgment rejecting their demand, dismissing their opposition and homologating the said tableau, they have appealed.

It appears that Myers & Levy have frequently been accommodation indorsers for D'Meza; that on fifteenth February, 1872, they indorsed one note for him for \$2225 70, and on twenty-seventh March, 1872, they indorsed another for \$1299 14, both payable at sixty days from date—in all, \$3524 82—which they as indorsers had to pay at maturity; that in obtaining these indorsements, D'Meza represented to Myers & Levy that he had an insurance on his life for \$10,000, issued by a New York Company, and that he would send on and have the policy divided into two of \$5000 each, and he promised, as soon as the policies were returned, he would deliver to them one as security for said two indorsements. The indorsements were made doubtless on the faith of this promise. It further appears that D'Meza sent his

policy to New York and had it divided into two for \$5000 each in his own favor, and when these policies were returned to him, he told Myers several times to go to his office and get the policy. He also told Myers to go to his office and to his book-keeper to get it, informing him that he had told the book-keeper that one of the policies was for Myers & Levy, but he did not go. The book-keeper, however, was not instructed by D'Meza to deliver the policy to Myers & Levy, although informed by his employer, D'Meza, that one of the policies was intended to be transferred to them. No transfer was made. After the death of D'Meza, the two policies were taken from his desk by the testamentary executor, and sent to New York and collected, and the proceeds are set down on the account to be distributed among the creditors of the succession.

That D'Meza intended to transfer one of these policies to the opponents to secure them as accommodation indorsers, there is no doubt; but the transfer was never made. The policies were never placed beyond the control of D'Meza. They remained in his desk, where he instructed his book-keeper to put them, till after his death. The theory that the policy for \$5000 which D'Meza had promised to deliver to Myers & Levy was transferred, because it was put in possession of D'Meza's book-keeper for them, and the possession of the latter was their possession, is not borne out by the facts disclosed in the record. The book-keeper never held the policy as agent or trustee for Myers & Levy. Although informed of his employer's intention in regard to one of the policies, he was never instructed to deliver it to Myers & Levy or any one else. There was, therefore, no delivery of the policy to Myers & Levy, although the deceased intended to do so. Consequently they never held it as a pledge or collateral security for their accommodation indorsements. The proposition that there was a sale of the policy to them is not supported by the proof adduced by the opponents themselves, and besides, it is at variance with the judicial admissions in their petition of opposition, alleging that they have a special lien on said policy of \$5000 to secure their debt, resulting from the payment of the notes of which they were accommodation indorsers. The opponents, Myers & Levy, pray that they "be decreed to have a privilege upon the life policy or the funds received thereon."

The averment and prayer of their petition, claiming a privilege on the policy, concede necessarily that the opponents have no ownership of the policy, because it would be inconsistent and absurd to set up a privilege upon a thing and claim the ownership thereof in the same suit. A privilege arises from the nature of the debt, and it gives a creditor a right upon the property of his debtor to secure the debt. If the opponents own the policy, there is no debt to be secured, and

 Succession of D'Meza.

their ownership of the property would not establish their demand to be ranked as privilege creditors of the deceased on account of their payment of the notes of which they were accommodation indorsers. Under the averments of their petition the opponents could not introduce proof of their ownership of the policy, and they offered none in support of it on the trial.

The proposition that the policy was sold to them is utterly unfounded, and the authorities which they offer in support of the position are without application to the case presented in the record.

Whether the opponents' remedy was an action to enforce the verbal contract with regard to the policy, or a suit for breach thereof, it is unnecessary to decide in disposing of this case. But it is proper to remark that a contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral not transferred or delivered in pursuance of said contract or promise; and this remark is pertinent to the case disclosed in the record.

Judgment affirmed.

 No. 2996.

LOUIS PARKER v. SHROPSHIRE & ANDERSON.

This case was originally brought before the parish court of Jefferson. Defendants excepted to the jurisdiction on the ground of the amount claimed, which they alleged to be above \$500. The exception was overruled, when the parish of Jefferson being divided and a part of it being annexed to the parish of Orleans, the suit was transferred to the Fifth District Court of the latter parish. The same original exception being raised there, was set aside on the ground that it had already been passed upon by the court from which the case was transferred.

This is an error. The suit should have been dismissed for want of jurisdiction of the parish court. The district court took the case as it was originally presented. It follows therefore that the court before which the defendants were cited not having jurisdiction over them, they were never subject to it; and not being under its jurisdiction, no judgment could properly be rendered against them.

APPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. Rice & Smith, Randolph, Singleton & Browne*, for plaintiff and appellee. *Fellows & Mills*, for defendants and appellants.

MORGAN, J. This suit was instituted in the parish court of Jefferson. The amount claimed is \$446 95, with interest from ninth July, 1866.

In the parish court defendants excepted to the jurisdiction upon the ground that the amount in dispute exceeded \$500. The exception was dismissed.

The parish of Jefferson having been divided, and a portion thereof having been annexed to the parish of Orleans, the case found its way

Parker v. Shropshire & Anderson.

into the Fifth District Court of this parish. There the exception was again urged and again overruled, for the reason that it "had been passed upon by the court from which the case was transferred." The exception having been dismissed, default was entered and confirmed. The appeal rests upon the ground of want of jurisdiction of the parish court of Jefferson. No question is raised as to the jurisdiction of this court, which seems to be conceded under the authority of the case of *Schlenker v. Taliaferro*, 20 An. 565.

The suit should have been dismissed for want of jurisdiction of the parish court. The constitution gives to these courts exclusive original jurisdiction in ordinary suits in all cases where the amount in dispute exceeds \$100 and does not exceed \$500. Here the amount in dispute exceeds \$500.

The district court takes the case as it was originally presented. It follows, therefore, that the court before which the defendants were cited not having jurisdiction over them, they were never subject to its jurisdiction. Not being under its jurisdiction, no judgment could properly be rendered against them.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that this suit be dismissed, appellees to pay the costs in both courts.

Rehearing refused.

No. 3064.

J. C. MURPHY & Co. v. MCCARTHY & FINNERTY.

The demand set up by the defendants in this case is, in its nature, independent from the action brought by the plaintiffs, and should therefore be considered as a principal, and not a reconventional demand.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. James Timony*, for plaintiffs and appellees. *E. Phillips*, for defendants and appellants.

TALIAFERRO, J. The plaintiffs in this case sue the defendants *in solido* for one hundred and forty dollars, the value of five barrels of eggs, the property of the plaintiffs, which they allege were stolen from the levee and found in the possession of the defendants. The answer is a general denial, and it sets up a reconventional demand against the plaintiffs of five thousand dollars as damages, defendants allege they have sustained by the act of the plaintiffs, in getting up against them an unfounded and malicious criminal prosecution as receivers of stolen goods, arising, as plaintiffs pretend, from the fact that a portion of the plaintiffs' eggs was found in the possession of defendants; the defend-

Murphy & Co. v. McCarthy & Finnerty.

ants asserting that the eggs in controversy found in their possession, were purchased by them in good faith from dealers in that article, and without knowledge that they were stolen property.

The court *a qua* overruled the reconventional demand and gave judgment *in solido* in favor of plaintiffs for \$39 90 with interest. The defendants appealed.

The defense, so far as it relates to one of the defendants, McCarthy & Finnerty was abandoned in this court.

There are three bills of exceptions in the record. We deem it important to examine but one of them. The plaintiffs except, that all the parties to this suit being residents of the same parish, and the demand of defendants not necessarily connected with or incidental to the plaintiffs' claim, it can not be set up in reconvention. Article 375 of the Code of Practice provides that: "In order to entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be, nevertheless, necessarily connected with and incidental to the same; as for instance, the demand instituted by the possessor in good faith against him who sues in order to evict him or for the purpose of obtaining the payment of the improvements made on the premises; provided, that when the plaintiff resides out of the State, or in the State, but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action."

In considering this bill of exceptions the proper inquiry seems to be, is the criminal proceeding complained of necessarily connected with and incidental to the civil action instituted by plaintiffs to recover the value of their property found in possession of the defendants? The defendants allege that they have been injured in character and business by the criminal prosecution instigated against them by the plaintiffs, and that they have sustained heavy damages thereby. They do not pretend that the damages they claim have grown out of the suit the plaintiffs have brought against them to recover the value of the eggs. The civil action of the plaintiffs to recover the value of their property received by the defendants, can not be considered as a defamation of their character. It is not easy, then, to see how the claim for damages is necessarily connected with and incidental to the civil action. The two proceedings, civil and criminal, appear to be distinct and separate, and either may exist without the other. Suppose the plaintiffs had chosen not to sue for the value of the property, and had sought only to have the defendants punished by criminal proceedings against them. The damages in that case, if any had been sustained, would clearly have arisen alone from the criminal

prosecution set on foot by the plaintiffs. The demand in reconvention in that case could not be connected with or be incidental to a civil action that had no existence. The state of things would be the same if, as in the present case, a civil suit existed for the value of the property as well as a criminal prosecution. As, then, the damages, if any, arose solely from the criminal prosecution, it would seem that the article 376 of the Code of Practice would apply :

"If the demand instituted by the defendant be one in its nature independent from the action brought by the plaintiff, it shall be considered as a principal not a reconventional demand, and must be brought at the domicile of the plaintiff."

Here, it seems the demand set up by the defendant is, in its nature, independent from the action brought by the plaintiff, and should be therefore considered as a principal and not a reconventional demand.

The exception should have been sustained, and, it being now so ruled, this court is without jurisdiction.

It is therefore ordered that this case be dismissed at the costs of the appellants.

No. 4851.

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113 41

ALBERT R. WHITNEY, GEORGE W. WHITNEY, Administrator, v.
BERTRAND SALOY.

Where the ground for the injunction restraining the executory proceedings of the defendant was, that there is a deficiency in the measure of the property bought by the plaintiff from the defendant—the price of which is secured by the mortgage sought to be enforced—and that, on account of this deficiency, there should be a diminution of the price ;

Held—That the sale being *per aversionem*—reference to the plan and to the streets bounding the squares controlling the expressions in regard to the measurement of the ground—the alleged deficiency can not avail the plaintiff in injunction.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J. O. W. Besançon, for plaintiff and appellant. *C. E. Schmidt*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment dissolving his injunction restraining the executory proceedings of the defendant.

The ground for the injunction is, there is a deficiency in the measure of the property bought by the plaintiff from the defendant, the price of which is secured by the mortgage sought to be enforced, and on account of this deficiency there should be a diminution of the price to the extent of \$850. The property is described in the deed as follows :

"The one-half of two certain squares of ground situate, lying and being in the city of Carrollton, in the parish of Jefferson in this State, and designated by the numbers fifty and fifty-one, on a plan made by Charles F. Zimpel, then a deputy surveyor of the United States,

 Whitney, Administrator, v. Saloy.

deposited in the office of Felix Grima, a notary public in this city (New Orleans). Said squares being contiguous, and comprised between Madison, Fourth and Fifth streets, and Canal avenue; said one-half of said two squares fronting seven hundred feet on Fifth street, with like dimensions on the line dividing it from the other half of said two squares, three hundred and twenty-five feet on Canal avenue, and the same measurement on Madison street; all American measure; together with all the buildings and improvements thereon, etc. Being the same property which said vendor acquired from John E. Schaffer, sheriff," etc.

From the description of the property we are of the opinion that the sale was *per aversionem*, reference to the plan and the streets bounding the squares controlling the expressions in regard to the measurement of the ground.

So, therefore, whether there be a deficiency of twenty-five feet in the measurement on Canal avenue or not, can not avail the plaintiff. Revised Code 2495; 14 La. 497. Besides, from the evidence, we are satisfied that the diminution complained of is not one-twentieth part of the totality of the objects sold. Revised Code 2494.

Judgment affirmed.

 No. 4842.

P. GALLAHER v. J. T. MICHEL et als.

The plaintiff in injunction not having set up, in defense to the suit against him, as he might have done, that he was discharged in bankruptcy from all his debts, can not make it a cause for an injunction.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Given Campbell*, for plaintiff and appellee. *R. King Cutler and John Ray*, for defendant and appellant.

HOWELL, J. In August, 1867, Benner & Ranlett instituted suit against Michel & Gallaher. In December, 1866, Gallaher applied for the benefit of the bankrupt law. In March, 1869, judgment was rendered in the above mentioned suit, against Michel and Gallaher *in solido* for \$1000, from which they took a suspensive appeal. On the eighteenth December, 1869, Gallaher obtained a final discharge in bankruptcy. On the eighth May, 1871, the Supreme Court affirmed the judgment against Michel & Gallaher. Michel, having paid, was subrogated to the rights of the plaintiffs therein and issued execution, which Gallaher enjoined on the ground that he was discharged in bankruptcy from all his debts.

It is contended on the part of the defendant in injunction, and we think successfully, that plaintiff not having set up this matter as a

Gallaher v. Michel et als.

defense to the suit against him, as he might have done, can not make it a cause for an injunction. See 3 An. 208. This principle is well settled.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be dissolved, and that defendant Michel recover of plaintiff Gallaher, principal, and Peter Casey, surety, on the injunction bond, *in solido*, three per cent. additional interest on the amount of the judgment enjoined, from the date of the injunction until payment, and one hundred and fifty dollars damages and all costs.

No. 4407.

A. W. WALKER v. E. VILLAVASO.

When an injunction was dissolved upon the face of the papers, no statement of facts, evidence or assignment of error is necessary to enable this court to pass on the correctness of the said ruling. This court has only to look into the allegations or grounds for the injunction to determine whether or not they are sufficient to authorize the writ; but this can not be done on a motion to dismiss.

Where, after a first injunction, which was dissolved, the sheriff was simply proceeding with a sale long after the seizure had been made, and where, on a second injunction being taken, it was alleged as a ground for said injunction that no demand of payment and no notice of seizure were ever served according to law;

Held—That these objections, if there be cause for them, should have been made on the first injunction.

Article 666 C. P. and the two preceding articles must all be construed together so as to give effect to each.

Where the ground for injunction was that the advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure;

Held—That when a plantation and its fixtures are to be sold under a mortgage as in this case, the sale must be made at the seat of justice unless the debtor require it to be made on the plantation.

The advertisement, in this case, describes the articles, called movables by plaintiff, as constituting a part of the buildings and improvements on the plantation, and with one or two trifling exceptions, they are what the law subjects to the mortgage existing on the plantation; but, if they were movables, it would not be a ground for enjoining the sale of the property subject to the mortgage, and besides, the plaintiff has not requested the sale to be made on the plantation.

A judgment, after its transfer, may be executed in the transferor's name, but if it be the transfer of a litigious right, as charged in this case, the debtor—the appellant herein—has not tendered payment of the price given, in order to put an end to litigation.

An error in the calculation of interest on the judgment rendered and sought to be executed, is no ground for an injunction. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *feri facias* be issued for too large a sum.

A PPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. Walker, in propria persona. Roselius & Philips,* for defendants and appellees.

ON MOTION TO DISMISS.

HOWELL, J. The defendant moves to dismiss the appeal in this case on the grounds:

Walker v. Villavaso.

First—Because there is no statement of facts, evidence, nor assignment of error apparent on the face of the record.

Second—Because the injunction was obtained, the suit instituted and the appeal taken in violation and contempt of the peremptory mandamus issued by the Supreme Court, reported in 20 An. 521.

Third—When an application was made to the Supreme Court to punish the appellant, Walker, and the Parish Judge of St. Bernard, the first for applying for, and the second for granting said injunction, both purged themselves of the contempt under oath, and in consequence thereof the rule was discharged, but at the same time Walker persisted in the violation of the mandamus by taking the present appeal.

Fourth—It is apparent from the record in the case that Walker is determined to abuse the writ of injunction to defeat the administration of justice and to defy the authority of the court.

1. As to the first ground, it appears that the injunction was dissolved upon the face of the papers, and hence no statement of facts, evidence or assignment of error is necessary to enable this court to pass on the correctness of the said ruling. We have only to look into the allegations or grounds for the injunction to determine whether or not they are sufficient to authorize the writ; but this can not be done on a motion to dismiss.

2, 3 and 4. It appears to us that the other grounds relate also to the merits, as it will be necessary to examine into the nature and sufficiency of the grounds for the injunction in order to determine whether or not the injunction is in violation and contempt of any order of this court, and intended to defeat the administration of justice. When we come to the merits of the appeal, if we find such to be the case we can render the necessary order on the subject.

The motion is refused.

ON THE MERITS.

HOWELL, J. This is the injunction to which we referred in the case of Villavaso v. Walker, 24 An. 213, where we remarked that "The grounds upon which he (Walker) bases his application for an injunction do not seem to be sufficient to justify the writ, but we are not prepared to say that the wrongful suing out of an injunction on alleged grounds, arising since the judgment, can be properly construed to be in contempt of the authority of this court; and we declined punishing him for contempt.

An examination of the record now before us has not removed the impressions we then had of the merits of the grounds for the injunction. The plaintiff herein has, since the year 1861 to the present time,

successfully baffled the defendant in the execution of an ordinary writ of seizure and sale issued upon an act importing confession of judgment, and this is the fourth injunction that the plaintiff has obtained. It was granted by the parish judge in the absence of the district judge, and when the papers were presented to the latter in chambers, in a different parish and without notice to the plaintiff, he gave an order dissolving the injunction, from which this appeal was taken.

This *ex parte* order was clearly irregular, but as the question is presented, whether the petition sets forth sufficient grounds for the issuance of the writ and the parties are regularly before us, it is unnecessary to remand the case to be tried contradictorily. We will review the action of the district judge in dissolving the injunction, as upon a motion to dissolve on the face of the papers.

First—The first ground is, no demand of payment and no notice of seizure were ever served according to law.

The seizure had been made long before, and the sheriff was simply proceeding with the sale after the dissolution of the injunction. These objections, if they existed, should have been made in the first injunction.

Second—The advertisement of the sale purports on its face to be made under three different writs, two in the name of different parties, and one being a writ of *fiery facias*.

This objection is totally without force.

Third—The advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure, and art. 666, C. P., is quoted. It enacts that “animals and utensils attached to plantations and manufactures, and such articles as can not be easily removed, must be sold on the spot where they are taken, on the day and hour appointed for this purpose by the sheriff.”

The two preceding articles provide that sale of the property must be made at the seat of justice, but in the country it may be made on the plantations which are to be sold, if the debtor require it, of which notice must be given in the advertisement. These articles must all be construed together so as to give effect to each. Where a plantation and its fixtures are to be sold under a mortgage, as in this case, the sale must be made at the seat of justice, unless the debtor require it to be made on the plantation. It is not intended that the articles attached to the plantation and which are mortgageable shall be sold in one place and the land in another. Under the writ of seizure and sale, all are seized and sold at one and the same time. The advertisement in this case describes the articles, called movables by the plaintiff, as constituting a part of the buildings and improvements on the plan-

tation, and with one or two trifling exceptions they are what the law subjects to the mortgage created on the plantation. But if they were movables it would not be a ground for injunction the sale of the property subject to the mortgage, and the plaintiff has not required the sale to be made on the plantation.

This disposes of the fourth, fifth and sixth grounds of objection.

Seventh—No legal notice of appraisement was served on appellant, and no legal appraisement was ever made.

The plaintiff has already obtained all the benefit of this objection if it existed, and it can readily be remedied in the future proceedings.

Eighth, Tenth and Eleventh—These grounds set up the discovery of a transfer by Villavaso, plaintiff in the seizure, to one J. E. Zunts, allege want of notice thereof, and charge it to be the sale of a litigious right.

They constitute no ground as presented for an injunction of an order of seizure and sale or writ of *fiery facias*. A judgment, after its transfer, may be executed in the transferrer's name. 13 An. 324. And if it be the transfer of a litigious right, as charged, the debtor, the appellant herein, has not tendered payment of the price given in order to put an end to litigation.

Ninth—There is error in the calculation of interest on the judgment rendered and sought to be executed, amounting to \$3450.

This refers to the twenty-five per cent. damages allowed upon the dissolution of one of the previous injunctions in this proceeding, and for which a *fiery facias* is in the hands of the sheriff. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *fiery facias* be issued for too large a sum.

We have patiently and carefully reviewed all the grounds presented by the plaintiff in injunction, and we must express the hope that the parties and officers who are executing the writs in question will strictly and faithfully observe all the requirements of the law, and so conduct the future proceedings herein as to avoid any pretext for a continuance of this already scandalous litigation, by which the execution of a simple order of seizure and sale has been protracted for twelve years.

It is therefore ordered that the judgment appealed from herein be affirmed with costs.

Rehearing refused.

No. 4814.

STATE OF LOUISIANA v. JAMES GALLAGHER.

After the regular panel of jurors was exhausted, and only four jurors therefrom had been sworn, the district judge ordered the sheriff to summon and select one hundred talesmen to appear on the following day to complete the jury, and continued the case. The challenge to the whole array of the talesmen when produced, was properly overruled.

If the jury can not be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court or its vicinity.

It is not said in the challenge that there were any bystanders present when the panel was exhausted, and this court is bound to presume, in the absence of proper evidence to the contrary, that the district judge and the officers of the court *a qua* did their duty.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *D. Goldman* and *James C. Walker*, for defendant and appellant. *A. P. Field*, Attorney General, for the State.

MORGAN, J. The defendant was indicted for murder, convicted of manslaughter, and sentenced to seven years imprisonment at hard labor. He has appealed. After the regular panel of jurors was exhausted, and only four jurors therefrom had been sworn, the district judge ordered the sheriff to summon and select one hundred talesmen to appear on the following day to complete the jury, and continued the case. On the following day, when Louis Ackerman was called to serve as a talesman, he being one of those summoned as above stated, and before he was sworn, the accused challenged the whole array of talesmen jurors, on the ground that the jurors in question were not drawn by the sheriff of the criminal court from any jury box containing the names of all persons liable to jury duty residing within the limits of the parish of Orleans, but that they were selected by the sheriff from certain portions of the parish, and that they were in no sense jurors *de talibus circumstantibus*, and had not been obtained from among the bystanders within the vicinity of the courthouse during the trial.

This, the counsel appointed by this court to defend the prisoner, assigns as error apparent on the record.

The replication of the attorney general shows that the regular panel having been exhausted and only four jurors having been obtained therefrom, the court ordered the sheriff to cause to be summoned one hundred good and lawful men as talesmen to serve as jurors in the case, and that in obedience to said order the sheriff produced in court the jurors so summoned.

In the *State v. Bunger*, 14 An. 464, the case is thus put by the court: "The sheriff having summoned the talesmen out of the presence of the court, and when the court adjourned over from day to day, it is contended that the persons so summoned were not bystanders, and as such not liable to serve as jurors. The counsel states in his brief: on this point, I am aware that the later American decisions have greatly relaxed the English common rule, but I contend that Louisiana has

State of Louisiana v. Gallagher.

adopted the common law of England as it stood in 1805, and that the late innovations on this well established principle of the common law do not apply to this State. The rule is undoubtedly as laid down by counsel, but it is obvious that if the jury can not be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court. The bill of exceptions does not set this matter right before the court, and we are bound to presume, in the absence of proper evidence to the contrary, that the district judge and the officers of the court did their duty on this occasion. If the sheriff did not act with impartiality toward the accused, as the latter complains, that was a matter of fact which ought to have been submitted to the district judge, and which rested in his sound discretion."

The object of the law is to secure a fair trial to the accused and his punishment if guilty. In this case, we fail to see in what respect the prisoner's rights have been invaded by the course pursued by the district judge at the instance of the Attorney General. He does not complain in his challenge to the array of the mode by which the talesmen were summoned; he simply objects that they were selected by the sheriff from certain portions of the parish of Orleans, instead of being taken from among the bystanders within the vicinity of the courthouse during the trial. It does not say that there were any bystanders present when the panel was exhausted, and we are bound to presume in the absence of proper evidence to the contrary, that the district judge and the officers of court did their duty on the occasion.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

No. 4875.

ARNOLD ELLIS et a's., Trustees, v. SOLOMON SILVERSTEIN.

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48	1259

Where the object of the suit is to cause defendant to vacate premises, the occupancy of which he claims under a lease, and neither party claims a money judgment, it is the amount of the lease which gives jurisdiction to this court. That amount not being sufficient, the motion to dismiss the appeal must prevail.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Randolph, Singleton & Browne*, for plaintiffs and appellees. *T. A. Bartlette*, for defendant and appellant.

MORGAN, J. Motion to dismiss on the ground that the amount in dispute is under \$500.

The object of the suit is to cause the defendant to vacate the premises No. 195 Poydras street. The defendant claims under a lease, which he says does not expire until the first January next, and he

 Ellis et als., Trustees, v. Silverstein.

avers that if he were evicted it would damage him in the sum of \$2000. Neither party claims any money judgment. We think it is the amount of the lease which gives us jurisdiction. Here the defendant only claims that he will owe, at the expiration which he assigns to it, \$375. Hence we have no jurisdiction.

The appeal is therefore dismissed.

Rehearing refused.

No. 4809.

THOMAS LYNNE v. CITY OF NEW ORLEANS, and E. T. MANNING v. the same. (Consolidated.)

The city of New Orleans, like any other plaintiff, has the right to control its own judgments and *feri facias*, and had the right to cause those issued in these cases to be set aside, but by so doing, it could not deprive the clerk, who had properly performed his duties, of his legitimate costs.

The objection made to his being paid, because, instead of turning over the *feri facias* to the city attorney, as directed, he gave them to the sheriff, is not well founded.

The clerk, at the time, was surrounded by a hostile body of men and driven by force out of the office to which he was by law entitled: under these circumstances, the court does not consider that, because the *feri facias* were sent to the sheriff's office at such a moment of tumult, for safe keeping, the clerk deprived himself of the right to claim the legal price of his work.

Where it was contended that, in a former proceeding before this court, while acting as clerk of the Eighth District Court, Manning was punished in this court for a contempt of its authority, and therefore that he had been recognized as clerk of said Eighth District Court, from which it follows that, having been recognized then, he must be recognized now:

Held—That this court takes cases as they are found and decides them upon the pleadings by which they are presented. In the proceeding referred to, Manning's right to office was not contested; in this case it is expressly put at issue. This court is therefore forced to declare whether he was, or not, entitled to the office when he took possession of it, and when the services for which he claims payment were made.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Frank N. Butler*, for Manning, appellant. *J. W. Thomas*, for Lynne, appellee. *H. H. Walsh*, assistant city attorney, for the city of New Orleans.

MORGAN, J. Plaintiff alleges that on the twenty-sixth October, 1872, the city of New Orleans, through its proper officers, filed in the late Eighth District Court, of which court he was clerk, various suits against delinquent taxpayers, numbering 5612 in all, which were entered that day on the docket of the said court by himself and his deputies, and numbered from 7907 to 13,517; that on the fifth November following, the city, through its attorney, moved for judgments by default in 5350 of said suits, which were allowed; that on the eleventh of the same month they were confirmed and made final; and that on the fifteenth of the same month *feri facias* issued thereunder.

Lynne v. City of New Orleans, and Manning v. the same.

He avers that his compensation for the services thus rendered by him is fixed by law at two dollars for each of said suits, which sum he says the city refuses to pay him. He prays judgment for \$10,700, with legal interest from judicial demand.

The city specially denies having moved for a default in the 5350 cases referred to by plaintiff, averring that on the fifth November exceptions were pending in 993 of said suits, and that the city was therefore without the legal right to a default therein. She specially denies the plaintiff's right to recover compensation for the services by him alleged to have been rendered in each of the 5350 cases for which he claims payment, because no *fieri facias* had been lawfully issued by plaintiff in any one of said suits prior to the expiration of the term of his office as clerk, and that, for want thereof, plaintiff is not entitled to recover any sum whatever; that if *fieri facias* were issued by him they were improvidently and unlawfully issued in express violation of the instructions and orders of the city's attorney.

The city, however, admits that certain proceedings against sundry tax delinquents were instituted in the Eighth District Court, and admits that in a few of said suits she is liable to pay the costs and fees prescribed by law, but says that the fees for which she admits a liability, are not alone claimed by plaintiff; that they are also claimed by E. T. Manning and John Burke, who deny plaintiff's right thereto, and that, as it is impossible for her to determine the party to whom the amount due and owing by her shall be paid, she prays that Manning and Burke be made parties and cited to appear and defend the suit; that the court fix the entire amount of respondents' indebtedness, and determine to whom it shall be paid.

Then Manning instituted his suit. He avers that he was duly elected clerk of the Eighth District Court and installed in the office thereof on the twenty-first November, 1872; that in the discharge of his duties, and in obedience to special instructions from the law officers of the city, he did certain work for the city in connection with a large number of suits instituted in the Eighth District Court against sundry tax delinquents, for which services he is entitled to be paid by the city \$6878 25, as he says will appear by reference to accounts A and B, which he annexes to and makes part of his petition. He asks judgment for \$6878 25. The numbers in these accounts correspond with the numbers in the bill charged for by Lynne. We suppose there is no doubt about their being the same suits.

Neither the bill presented with the petition, nor the accounts A and B, show what the services rendered by Manning were, nor does he declare in what they consisted in his petition. His bill is in the following words: "City of New Orleans to Edward T. Manning, Dr. 1872,

Lynne v. City of New Orleans, and Manning v. the same.

December 9. To clerk's fees in 2755 city tax suits for the year 1872, as per list A, \$2066 25. To clerk's fees in 4850 city tax suits for the year 1872, as per lists A and B, \$4850, less \$38 received on account, \$6878 25." The accounts A and B give the number of the suit and the names of the defendants. The numbers include the Nos. 7907 and 13,517, alleged by Lynne to have been filed by him.

To this petition the city again admits that, in a few of the cases, she is liable for costs, but avers that they are claimed by Lynne and Burke, and prays for a decision which will protect her. Burke, after default, disclaims any right, title or interest to the fees claimed by Lynne and Manning, except such as the law allows him for filing documents in order to transfer the same from the Eighth District Court to the Superior District Court.

Lynne, answering Manning's petition, denies that he was regularly and lawfully installed or inducted into the office of clerk of the Eighth District Court, or that he was ever lawfully commissioned thereto. He avers that he (Lynne) was discharging the duties of clerk, to which office he had been appointed, on the twenty-sixth March, 1870; that he was discharging his duties as such until the twenty-first November, 1872, when he was forcibly ejected from said office by Manning and others, and thereby prevented from discharging his duties from that period until the office itself was abolished; that Manning, combining with others to wrongfully obtain possession of the office, procured and caused to be issued by Governor Warmoth a pretended commission of clerk, which commission was issued illegally and before his (Lynne's) term of office had expired, and before the votes of the parish of Orleans had been canvassed by the lawful board of commissioners. He therefore avers that Manning was never clerk of the Eighth District Court, *de jure*, and that he is not entitled as against him (Lynne) to claim any of the fees or emoluments thereunto appertaining. Upon these issues the parties went to trial.

There was judgment in favor of Lynne for \$9742, and the claim of Manning was dismissed. Manning appeals. In this court the city, through its attorney, in the brief filed by him, says that she is only a stake holder, and desires only that such judgment may be rendered as will protect her against a double payment.

The first question to be determined is, whether any work was done by Lynne, and if so, whether it was done, as is charged in the answer, improvidently and unlawfully. The assistant city attorney, who says in his testimony, that he has special charge of that class of the city's business, being asked "who issued the writs of *fiery facias* from the Eighth District Court prior to the thirteenth December, 1872?" answered that "the writs were first improvidently issued by Mr. Lynne,

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who was at that time clerk of the Eighth District Court, and after having been so issued by him, were countermanded and quashed by an order from the Eighth District Court on motion of myself as attorney for the city." And so in the record we find "on motion of H. H. Walsh, assistant city attorney and on suggesting to the court that Thomas Lynne, ex-clerk of the Eighth District Court, and Robert Lynne, ex-deputy clerk, in disobedience to a direct order from George S. Lacey, city attorney, have caused to be placed in the hands of C. S. Sauvinet, late sheriff of the parish of Orleans, 5618 writs of *feri facias* in tax judgments, rendered in this honorable court, in favor of the city of New Orleans against sundry taxpayers for their taxes of 1871, that they were illegally and inadvertently issued; it is ordered that the said *feri facias* be quashed and set aside, and the said Sauvinet be ordered to forthwith return them into court, at the costs of defendant."

This is a judicial admission that the work was done. Of course, the city, like any other plaintiff, has the right to control its own judgments and *feri facias*, and she had the right to cause those issued in these cases to be set aside. But the question is whether she could, by so doing, deprive the clerk, who had properly performed his duties, of his legitimate costs; and the question reverts were the *feri facias* issued "illegally, inadvertently and without authority," as is stated in the city's answer and in the motion upon which they were "quashed?"

On the ninth November, 1872, the city attorney addressed the following letter to Lynne: "Sir: As much confusion has arisen in the issuing of *feri facias* in the city tax suits, before this office has made proper entries in reference thereto, and as the interests of the city require that such writs should not be precipitately issued, you are hereby directed to issue no *feri facias* upon tax judgments unless specially directed so to do. Signed, George S. Lacey, city attorney."

This letter was handed to Lynne by the assistant city attorney, as appears from his certificate.

Then comes the following letter:

New Orleans, November 14, 1872. Thomas Lynne, Esq. Sir—As soon as the law will permit, you will proceed to make out the writs of *feri facias* in all the tax judgments taken in the Eighth District Court, and turn the same over to this office to be receipted for and registered here; a due protection of the city's interest requires that no writs of *feri facias* should be placed in the hands of the sheriff except through this office. Signed, George S. Lacey, city attorney.

These instructions clearly show that when Lynne issued the *feri facias*, he was not acting illegally, inadvertently or without authority. He was acting under orders which he was bound to obey. The motion

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to quash the *feri facias* show that he had issued them. Under these circumstances, we think he is clearly entitled to the compensation for the work which he did.

There is an objection made to his being paid because, instead of turning over the *feri facias* to the city attorney's office he gave them to the sheriff. The reason he gives for this, found in the following letter, written to the city attorney when informed of the motion to quash the *feri facias* is, we think, satisfactory:

"New Orleans, November twenty-three, 1872. George S. Lacey, Esq., city attorney. This morning's papers acquaint me of what was done in the Eighth District Court yesterday. The *feri facias* stated to have been sent to the sheriff were not sent to his office for execution. They were sent there in packages by me for safe keeping, and until I could get an opportunity to convey them to your office in compliance with your order. Had you been present at the time and seen the tumult and excitement, you would have advised the course I pursued. I may not deem it advisable to go to court to-day, and you would enable me to carry out the original intention if you send an order and cab for them at my expense. Very respectfully, Robert Lynne."

He was surrounded by a hostile body of men, and driven by force out of the office to which he was by law entitled.

Under these circumstances, we do not consider that because the *feri facias* were sent to the sheriff's office in such a moment of tumult, for safe keeping, that Lynne deprived himself of the right to claim the legal price of his work. The city has not shown that she could not have obtained possession of these *feri facias* on demand; it is not denied in any of the pleadings that the *feri facias* were not made out in due form of law; it must have been a matter of indifference to the city who performed the mere clerical labor of making them out and issuing them; and there was never any necessity that we have been able to discover for having them quashed, merely that they might be made over again by some other person. We think the judgment as to Lynne is correct.

Is Manning entitled to anything? He says he did the work for which he charges, under authority derived from the following entries on the execution docket:

"Issue *feri facias* in every city tax case wherein judgments have been signed for 1871, and wherein the amounts are not appealable, and wherein no exceptions have been filed." November 30, 1872. Signed, H. H. Walsh, assistant city attorney.

And on the ninth December: "Issue *feri facias*." Signed by the same counsel.

It was under these instructions that he did the work for which he

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now claims to be paid. The city has the right to make as many costs as it likes. The laborer, it is said, is worthy of his hire, and if Manning did the work under instructions, and was at the time he did it the lawful clerk of the Eighth District Court, he must be paid for it.

The question is, was he legally the clerk of that court?

In the record we find the following admissions :

"It is admitted that Mr. Lynne was *de facto* and *de jure* clerk of the Eighth District Court, on the twenty-first day of November, 1872, and that on that day, Mr. Manning, one of the plaintiffs in this case, took possession of the clerk's office of the Eighth District Court, with the assistance of certain persons claiming to be deputies of W. P. Harper, who claimed to be the civil sheriff of the parish of Orleans.

"It is admitted that, on that day, the Board of Returning Officers, constituted by law, had not proclaimed the result of the election in the parish of Orleans, and that Mr. Manning's commission, issued by Warmoth, was issued in anticipation, and before the result of the election had been legally ascertained as required by law.

"It is admitted that Lynne was ejected from the clerk's office of the Eighth District Court, and still claimed to be the clerk, up to and including the twelfth day of December, 1872, and that, during the period intervening between the twenty-first day of November, and the thirteenth day of December, 1872, when the act creating the Superior District Court went into operation, which act abolished the Eighth District Court, Mr. Lynne was prevented from occupying said office against his will.

"And it is further admitted that, at the time the Eighth District Court was abolished, thirteenth December, 1872, the Board of Returning Officers had not proclaimed the result of the election in the parish of Orleans, and that Mr. Manning had not been commissioned to that office by virtue of such return, and never was commissioned to that office.

"And it is still further admitted that, when the returns were proclaimed by the legal returning board, Mr. Manning was returned as elected to the office of clerk of the Eighth District Court, and this return was made three days subsequent to the abolition of the Eighth District Court."

These admissions, it seems to us, make it impossible for any court of justice to give him relief. He admits that the commission under which he pretended to act, was issued in anticipation and before the result of the election in virtue of which he claims the right to the commission had been legally ascertained; that Lynne was ejected from the office of the court of which he was *de facto* and *de jure* clerk; that the work was done between the twenty-first of November and the thirteenth of

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December, and that during that time he (Lynne) was prevented from occupying the office against his will; that, when the Eighth District Court was abolished, the board of returning officers had not proclaimed the result of the election, and that no commission based upon such return (upon which return alone a commission could legally issue) ever was given to him. Finally, he admits that the returns of the election were only proclaimed three days after the court of which he had been elected clerk had been abolished. In other words, he admits that he strode into a public office and pushed the legal incumbent thereof from his stool; that he drove him out by force and kept him out against his will, without even having had a commission legally issued as an excuse for this bold usurpation.

In this country we profess to be governed by laws, and not by mobs. Parties claiming rights to office assert those rights, as other claimants do, through the courts; it is not permitted to them to take possession in despite of the legal rights of others, by force of arms. If they do, their tenure must necessarily be short, and their profit nothing. In a former proceeding before this court, while he was acting as clerk of the Eighth District Court, Manning was punished by us for a contempt of our authority. It is therefore contended that he has been recognized by us as clerk of that court, and that, having recognized him then, we must acknowledge him now. We take cases as we find them, and decide them upon the pleadings by which they are presented. In the proceeding referred to Manning's right to office was not, that we are aware of, contested. Here it is expressly put at issue. We are therefore forced to declare whether he was or was not entitled to the office, when he took possession of it and when the services for which he claims pay were rendered. We conclude that he was not, and therefore it follows that he can recover nothing.

In the case of Lynne v. The City, the judgment was in favor of Lynne. In the case of Manning v. The City, the judgment was in favor of the city. Both judgments are correct.

It is therefore, ordered, adjudged and decreed that the judgments of the district court in these consolidated cases be confirmed with costs.

Denney v. Johnson.

No. 2984.

JACOB DENNEY v. L. L. JOHNSON.

Where a contract has for its consideration an illegal currency reprobated by law, the plaintiff suing on that contract can not recover.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. E. W. Huntington*, for plaintiff and appellee. *Race, Foster & Merrick*, for defendant and appellant.

TALIAFERRO, J. This is a suit upon an account for \$50. The defendant repudiates the claim on the ground that the consideration upon which it was founded was the payment of Confederate money. The plaintiff had judgment as prayed for, and the defendant has appealed.

This, in one respect, belongs to a class of cases with which the courts have become familiar, that of plaintiff and defendant contradicting under oath the testimony of each other in the most direct terms, imposing upon courts and juries the task of determining on which side lies the preponderance of proof.

It appears that in the early part of the year 1862, the plaintiff having a large quantity of molasses for sale on his plantation in the parish of St. James, meeting in New Orleans the defendant and several other persons, proposed to them to sell molasses at twenty-five cents per gallon, to be paid for at the termination of the war then existing between the United States and the insurgent States, or so-called Confederate States. To the plaintiff was sold one hundred barrels, to Joshua M. Craig a hundred barrels, to Daniel H. Sessions one hundred barrels, to Cyrus Johnson, Walter Sessions and Richard H. Sessions, each fifty barrels. This sale was entered into at the St. Charles Hotel, the parties all being present when it was entered into. The defendant in his testimony says in positive terms that the molasses was to be paid for at the close of the war in Confederate money or Confederate bonds. The testimony of Walter Sessions, Daniel H. Sessions, Richard H. Sessions and Joshua M. Craig, four of the persons who purchased at the same time, taken under commission sent to Arkansas, fully corroborate the testimony of the defendant. These four witnesses all detail minutely the circumstances under which the sale took place—the time, place, persons present, etc. They all say the same thing in respect to the terms. They all declare the contract was that the molasses was to be paid for at twenty-five cents per gallon in Confederate money or Confederate bonds at the close of the war. The defendant and four witnesses swear distinctly that these were the terms of sale. Against this evidence there is only the positive statement of the plaintiff that payment was to be made “in the currency

of the country" after the war was over. But it is shown that, since the close of the war, the defendant paid the plaintiff \$100, and it is inferred by the judge *a quo* that this was made under a new promise, there existing a natural obligation on the defendant to pay for the property, and this inference he thinks is strengthened by the circumstance that defendant's witnesses, who purchased at the same time, have made similar new promises. Whatever may be the subsequent course these witnesses have thought proper to adopt in regard to their own affairs, it by no means affects the defendant, who stands upon the inherent vice of the only engagement he made with the plaintiff, that of paying for the molasses at the close of the war in Confederate money or Confederate bonds, a stipulation which four of the witnesses substantially establish to have been made by the plaintiff and accepted by the purchasers. So far from entering into a new obligation to pay the plaintiff's claim, the defendant's own testimony is very positive that no such new agreement was made. He says: "I gave the plaintiff \$100 since 1862, I think about two or three years ago in the city of New Orleans. I gave the above sum to plaintiff to get rid of the annoyance he caused me by trying to induce me to pay for the molasses in United States currency." I considered the sum stated a present to plaintiff, as I did not consider I owed him anything. I gave him the above sum with the request that he would never mention the molasses to me again, as I owed him nothing. I do not remember what I said at the time I gave him this sum. I remember he took the money, and did not take any offense at what I said and did." The plaintiff's own testimony is the only evidence that contradicts these statements. There is nothing in the record supporting the plaintiff's evidence to give it the preponderance over the defendant's evidence. It is for the plaintiff to make out his case beyond doubt.

It may be adverted to, in considering issues of the kind here presented, that the contemporaneous history of the late rebellion establishes that during the early period of the war, embracing the time when the contract was entered into in this case between the plaintiff and defendant, there was throughout the insurgent States an almost universal conviction and belief that a revolution would be accomplished and a new government established in those States. The so-called Confederate money had then supplanted every other currency in the Southern States, and it had credit and value attached to it; and at that time instances were rare of persons who doubted the ultimate success of the intended new government or the reliability of its currency. These facts we deem not without weight in a case like the present, where a conflict of evidence occurs as to whether Confederate money formed the consideration of the contract.

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We conclude that the contract in this case had for its consideration an illicit currency reprobated by law, and that the plaintiff can not recover. 20 An. 37; 19 An. 165.

It is therefore ordered and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff's demand be rejected and this suit dismissed at his costs.

No. 4920.

STATE ex rel. BENTON et al. v. JUDGE OF THE SUPERIOR DISTRICT COURT.

Where the Judge of the Superior District Court refused a suspensive appeal from an order rendered by him in a certain suit pending in that court, wherein the relators are defendants—which order was—that their books be produced in court and experts be appointed to examine them on or before the trial of the case;

Held—That, from an examination of the record presented, this court is inclined to think that the appeal should have been granted.

APPPLICATION for a Writ of Mandamus against the Judge of the Superior District Court, parish of Orleans. *Hays & New*, for relators.

TALIAFERRO, J. The complaint of the relators is that the Judge of the Superior District Court refused them a suspensive appeal from an order rendered by him in a certain suit pending in that court wherein they are defendants, that their books be produced in court and experts appointed to examine them on or before the trial of the case. Upon the relator's application to this court for a writ of mandamus to compel the defendant to grant the appeal a rule nisi was granted, and the judge thereto answers:

First—That the case *McMahan v. Benton et al.*, No. 9247 on the docket of his court, has not been tried on its merits.

Second—That in rendering the order for the production of the defendant's books and for the appointment of experts, he proceeded according to articles 140, 441, 442 and 443 of the Code of Practice.

Third—The order complained of is interlocutory and can not work an irreparable injury to the defendants.

Fourth—That the defendants sought the appeal and not the Accommodation Bank. That it will be seen that the Accommodation Bank is not the defendant or any party to this suit, and never applied for an appeal in this case.

From an examination of the record presented we are inclined to think the appeal should have been allowed.

It is therefore ordered that the rule be made absolute, and that the defendant in rule be required to grant the relators a suspensive appeal as applied for upon their entering into bond and security as required by law.

No. 4826.

STATE OF LOUISIANA ex rel. SLACK et al. v. F. A. HALL.

Where the grounds to dismiss the appeal are, that the right to office is involved, and in such cases, when an appeal is taken, it should be made returnable in ten days after the rendition of the judgment appealed from in conformity with law; that the judgment of the lower court in this case was signed September 20, 1873; that on the twenty-second of the same month the appellants by motion in open court applied for and obtained an appeal returnable on the first Monday of November, 1873;

Held — That the motion to dismiss the appeal must prevail.

The policy of the law in requiring appeals in cases involving the right to office to be made returnable in ten days after rendition of judgment, is obviously to have such cases determined speedily and with the least possible delay. This requirement of the law must therefore be construed strictly.

The illegality of the return is not obviated from the fact that the appellate court was not in session when the judgment was rendered and not to convene again until the first Monday of November.

Had the appeal been made returnable within ten days as the law requires, the appellant would not have lost his right of being heard on appeal as soon thereafter as the court should be in session.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. A. L. Slack*, District Attorney pro tem., *R. J. Caldwell* and *John Ray*, for relators and appellants. *Morrison & Farmer*, for defendant and appellee.

ON MOTION TO DISMISS.

TALIAFERRO, J. The grounds presented in support of the motion to dismiss this appeal, are the following:

That the right to office is involved, and in such cases, when an appeal is taken, it should be made returnable in ten days after the rendition of the judgment appealed from, in conformity with section seven of the act No. 45, of the extra session of 1870, and section 1904 of the Revised Statutes, page 331.

That in the appeal taken in this case, the law has not been complied with. The judgment of the lower court was signed September 20, 1873. On the twenty-second of the same month the appellants, by motion in open court, applied for and obtained an appeal returnable on the first Monday of November, 1873.

That the appeal should have been made returnable on the thirtieth of September, and it was by the fault of the appellant that it was not. The authorities relied upon are *Ingram v Doherty*, 21 An. 174; *State ex rel. Blandin v. Clay*, 22 An. 596; *State ex rel. Bovee v. Herron*—not reported. We think the motion must prevail.

The policy of the law in requiring appeals in cases involving the right to office, to be made returnable in ten days after rendition of judgment, is, obviously, to have such cases determined speedily, and with the least possible delay. This requirement of the law must therefore be construed strictly.

State of Louisiana ex rel. Slack et al. v. Hall.

It is argued with some plausibility that the appellate court not being in session, when the judgment was rendered, and not to sit again until the day on which the appeal was made returnable, it would have been nugatory to have the appeal made returnable within ten days. It may be said on the other hand, that had the appellate court been in session, so that the appeal could have been presented within ten days, but being made returnable on the first Monday of November, it clearly might have been dismissed on account of the illegality of the return. That illegality is not obviated from the fact the appellate court was not in session when the judgment was rendered, and not to convene again until the first Monday of November. Had the appeal been made returnable within ten days, as the law requires, the appellant would not have lost his right of being heard on appeal as soon thereafter as the court should be in session.

It is ordered that the appeal be dismissed.

No. 4795.

STEPHEN C. STERLING v. PARISH OF WEST FELICIANA.

It has been frequently determined that police jurors are political corporations whose powers are specially defined by the Legislature, and that they can legally exercise no other powers than those delegated to them.

For all purposes for which they are by law authorized to create debts, they are authorized to levy and collect a tax for paying the same. But, without a special grant of power by the Legislature for that purpose, they clearly have no authority to issue and put in circulation instruments of any kind.

No special statute is shown in this case conferring upon the parish of West Feliciana the authority to issue the negotiable notes or warrants upon which the plaintiff sues.

The position that the warrants or negotiable instruments of indebtedness which are the objects of this suit, were issued to defray the necessary expenses of the parish is not tenable. The police jury was not authorized to do it in any other way than by levying and collecting a tax for that purpose. Said negotiable instruments are null and void.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J. Kennard, Howe & Prentiss* and *Samuel J. Powell*, for plaintiff and appellee. *W. W. Leake* and *Race, Foster & Merrick*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues for \$3571 42 with interest. He founds this demand upon sundry obligations termed warrants issued to various persons under the authority of the police jury of the parish, drawn in favor of the payees or their order, and which the plaintiff alleges he holds as owner under the regular assignment and endorsement of the payees in due course of commercial business and for a valuable consideration. The instruments sued upon are in the following form:

"\$20. West Feliciana, Louisiana, May 8, 1869. Warrant No. 114. The Treasurer of the parish of West Feliciana will pay to E. L. Weber

26	59
48	333
48	767
49	1758
49	1768
49	1779
26	59
113	545
113	554

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or order twenty dollars. J. D. Smith, E. D. Remondet, parish auditor. Endorsed J. S. Wooster, treasurer. E. L. Weber. May 12, 1869.

These notes or warrants, of which the plaintiff sets himself out as holder, appear to have been duly protested for non-payment.

The answer is that there were no funds in the parish treasury when these warrants were issued, and that there have been none since; that the warrants were illegally issued as bills of credit or money. The authority of the police jury or of its officers to issue the warrants is denied, and defendant alleges that no provision for their payment has been made as required by law. Prescription of five years is pleaded. The plaintiff had judgment for the sum claimed with interest, and defendant has appealed.

It has been frequently determined that police juries are political corporations whose powers are specially defined by the Legislature, and that they can legally exercise no other powers than those delegated to them. They are specially required by statute when, within the scope of their legitimate powers, they create a debt against the parish, to provide in the same act the means of paying it. For all purposes for which they are by law authorized to create debts they are authorized to levy and collect a tax for paying them. But without a special grant of power by the Legislature for that purpose, they clearly have no authority to issue and put in circulation negotiable instruments of any kind. No special statute is shown in this case conferring upon the parish of West Feliciana the authority to issue the negotiable notes or warrants upon which the plaintiff sues in this case. It is contended that, as these instruments were issued for the purpose of paying the necessary expenses of the parish, such as fees to the sheriff, to the jailor for maintenance of prisoners, to the district attorney of the district for services rendered in the parish, to the coroner of the parish, to a certain party for building a bridge, etc., they were therefore properly issued for a legitimate purpose, that of defraying the necessary expenses of the parish—that a distinction exists between this case and others where police juries have put in circulation notes or bonds for the purpose of raising money on them. The answer to this reasoning seems plain: that the police jury is vested with power to levy and collect a tax to defray all the necessary expenses of the parish, and that they are not authorized to do it in any other way. And it would seem from the very case before us that “to this complexion must it come at last,” for it is shown that, for several years past, the parish in question has annually issued instruments of the kind now sued upon, taking up old issues by new ones, that there has not been from 1866 to 1872 any taxes collected in currency, that there has not been a dollar in currency in the parish treasury since the

Sterling v. Parish of West Feliciana.

war; and now the plaintiff in this case prays a decree of the court ordering a tax to be assessed and collected to pay his claim.

The doctrine held in the case of *Breaux v. The Parish of Iberville*, 23 An. 232; and *Marionneaux v. The Parish of Iberville*, same volume, p. 251, and in the case of *Edwards v. The Parish of Bossier*, 24 An. 459. is applicable to the case at bar. We must then, seeing that the negotiable instruments sued upon by plaintiff were issued without authority of law, regard them as null and void.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that there be judgment for the defendant, the plaintiff paying costs in both courts.

The decree rendered in this case was not intended to conclude the right of the plaintiff to claim from the parish payment for services rendered the parish, but only to decide in conformity with previous decisions that a parish unauthorized by legislative act, is without power to make and put into circulation negotiable paper, or instruments of any kind bearing on their face the character of commercial paper passing by indorsement or delivery like those upon which this suit was founded.

Rehearing refused.

No. 3273.

R. C. OGLESBY v. WM. B. HELM.

26	61
115	489

Where an application is made for the revision of a judgment for five hundred dollars and costs of suit, this court, of its own motion, must dismiss the appeal on account of a want of jurisdiction *ratione materiae*.

In order to determine the jurisdiction of the court, the amount in dispute at the time the suit was filed alone, must be considered. Costs, subsequently accruing, can not be estimated so as to give this court jurisdiction.

An action not revisable by an appeal is not revisable in this court by an action of nullity, or by an appeal from the judgment in the action of nullity.

This court not having jurisdiction of a judgment because the matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes prescribed by the Code of Practice.

APPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Fellows & Mills*, for plaintiff and appellant. *Wooldridge & Thomas*, for defendant and appellee.

WYLY, J. On sixteenth of December, 1870, the defendant obtained judgment against the plaintiff for five hundred dollars and costs of suit. On thirteenth of June, 1871, the plaintiff brought this suit to annul said judgment and enjoined the execution thereof pending the action. This, then, is an effort to revise a judgment for five hundred dollars and costs of suit. Of our own motion we must dismiss the appeal, because this court is without jurisdiction *ratione materiae*.

In order to determine the jurisdiction of this court, the amount in dispute at the time the suit was filed, alone must be considered. The defendant then demanded of the plaintiff five hundred dollars, only. Costs subsequently accruing can not be estimated so as to give this court jurisdiction of the case, which it did not have when the litigation began. An action not revisable by an appeal is not revisable in this court by an action of nullity or by an appeal from the judgment in the action of nullity. This court, not having jurisdiction of the judgment, because the matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes provided by the Code of Practice. A different view was taken of the matter at the time the motion to dismiss was rejected by this court; but after more mature reflection, we are of the opinion that we erred in not dismissing the appeal at that time. That error must be corrected now, because this court can not rightfully assume a jurisdiction not conferred by the Constitution.

It is therefore ordered that the appeal herein be dismissed at appellants costs.

No. 4812.

STATE OF LOUISIANA v. AUSTIN E. SMITH.

Where the assignment of error is that the judge *a quo* erred in overruling the motion of defendant to quash the panel of tales jurors, because they were selected by the sheriff and not drawn from the list of registered voters as the regular panel, it was

Held—That the facts, as to this matter, having not been brought up in a bill of exceptions, it must be presumed that the judge and sheriff did their duty. But this court can properly state in this connection that talesmen are not regular jurors and are not to be drawn and summoned as such. They are necessarily to be summoned without observing the formalities of drawing and summoning the regular panel.

Where the indictment recites that the grand jurors were duly impaneled and sworn, if it be sacramental for the expression, "upon their oath present, etc.," to be used, this court has no doubt it was so used—the whole of said expression being in the transcript except the word "oath"—which is necessarily a clerical error.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. P. Field*, Attorney General, for the State. *S. Belden*, for defendant and appellant.

HOWELL, J. The defendant having been indicted for murder and found guilty of manslaughter, has appealed from the judgment sentencing him to imprisonment for five years at hard labor in the State penitentiary, and has assigned as error:

"*First*—That the judge *a quo* erred in overruling the motion of defendant to quash the panel of tales jurors selected by the sheriff."

The ground of the motion, as copied in the record, was that the said tales jurors were selected by the sheriff, and were not drawn from the list of registered voters as the regular panel was. The facts, as to

State of Louisiana v. Smith.

this matter, are not brought up in a bill of exceptions, and we should presume that the judge and sheriff did their duty. But we can properly state in this connection that talesmen are not regular jurors and are not to be drawn and summoned as such. They are necessarily to be summoned without observing the formalities of drawing and summoning the regular panel.

“*Second*—That the indictment is insufficient in this, that it does not appear to be presented on the oath of the grand jury.”

The indictment recites that the grand jurors were duly impaneled and sworn, and if it be sacramental for the expression, “upon their oath present, etc.,” to be used, we have no doubt it is so used; the whole of said expression being in the transcript except the word “oath,” which is necessarily a clerical error in copying. We can make no other rendering of the paragraph.

Judgment affirmed.

Rehearing refused.

No. 3012.

SAMUEL JAMISON v. J. H. POTHAUS et als.

In view of the facts detailed by plaintiff himself, showing that he and his family, departing from New Orleans, where his usual residence used to be, lived and resided during the war within the Confederate lines, it is evident that plaintiff did not reside in New Orleans on the sixth of April, 1863, the time of the protest of the note on which he appears as indorser, and that, as he had no known place of residence, the notice deposited for him by the notary in the post office, pursuant to the act of 1855, was sufficient to fix his liability.

Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Thos. Hunton*, for plaintiff and appellant. *James Brewer, H. L. Davis*, for defendants and appellees.

MORGAN, J. The plaintiff appeals from the judgment rejecting his demand to recover of the defendants \$3175, the amount paid by him in compromise of a note on which he was an indorser. The ground for the action is, that plaintiff made the payment in ignorance of the fact he was not liable as indorser, because he had not been properly notified of the dishonor of the note.

The first question is, was the plaintiff properly notified of the dishonor of the note?

If his residence was in the city as he contends, at the time of the protest in August, 1863, the notice was insufficient, because it was not

served personally, nor at the domicile of the plaintiff. But if he did not reside here and had no known place of residence, as the defendants contend, the notice deposited in the postoffice for him, pursuant to the act of 1855, was sufficient to fix his liability.

It is true the plaintiff swears that his domicile was on Baronne street, where he has resided for the last twenty years; still the facts detailed by him on cross examination show conclusively that he did not reside there in August, 1863, the time of the protest, and that he then had no known place of residence. He left the city in May, 1862, to go into Confederate lines; neither he nor his family resided here in 1863; he does not know where he was on the sixth August, 1863, but thinks he was at Opelousas or at Natchitoches; he did not return with his family to reside in New Orleans until after the war.

In view of the facts detailed by himself, showing that the plaintiff and his family lived and resided during the war in Confederate lines, we have no difficulty in finding that the plaintiff did not reside in New Orleans on the sixth August, 1863, the time of the protest of the note, notwithstanding his conclusion or opinion to the contrary.

He had no known place of residence and the notice put in the post-office for him by the notary was sufficient. 6 An. 364.

Besides, at the time of the compromise, the plaintiff knew he had not been served with notice of the dishonor of the note either in person or at his residence, because his person and his residence being in Confederate lines at the time of the protest could not be reached by the notary.

For \$3175 the plaintiff settled or compromised the debt which amounted to some \$4500, including interest. He preferred to pay this sum to the hope of gaining balanced by the danger of losing the lawsuit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. And the plaintiff has failed to show sufficient grounds to annul it.

Judgment affirmed.

State ex rel. Taylor v. Judge of the Superior District Court.

No. 4910.

STATE ex rel. R. TAYLOR v. JUDGE OF THE SUPERIOR DISTRICT COURT.

It has been so often decided that a defendant may release on bond the sequestration of his property that it can no longer be considered an open question.

The right to appeal from the order refusing this right is equally well settled.

It is not true that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered *ex officio* by the court under article 274 can not be thus released.

Article 279 C. P. means what it says. Its terms are general. Except in cases of failure, any sequestration may be released on bond. Were the meaning of article 279 doubtful, a liberal construction would be given to it, because the article is remedial in its character.

APPPLICATION for a mandamus against the judge of the Superior District Court, parish of Orleans. *W. H. Hunt*, for relator.

WYLY, J. The State sued to annul the lease or contract by virtue of which the relator controls and administers the New Canal and shell road extending from the city to the lake.

While this suit was pending for trial in the Superior District Court, the judge, on the suggestion of the Attorney General, made an *ex parte* order directing the sequestration of the "shell road, the canal, basin, dredge boats, toll gates, horses, mules and all other property connected with, used in its operation or in any wise appertaining thereto." Under this order all the property was seized by the sheriff.

The relator then moved to set aside the sequestration on giving bond for the value of the property sequestered. Being refused this right, he sought in this court the mandamus upon which the case is now presented for examination.

It has been so often decided that a defendant may release on bond the sequestration of his property, that we consider it no longer an open question.

The right to appeal from the order refusing this right is equally well settled.

"The possession and use of the property of the defendant may be necessary to the maintenance of his credit; to the performance of his obligations to others; nay, to the very existence of himself and family. A judgment rendered in his favor after years of litigation, restoring him to his property, would come too late to afford a remedy. The injury might be irreparable." 5 N. S. 42.

The respondent, however, contends that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered *ex officio* by the court under article 274 can not be thus released.

"A defendant against whom a mandate of sequestration has been obtained, except in cases of failure, may have the same set aside by executing his obligation in favor of the sheriff, with one good and

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State ex rel. Taylor v. Judge of the Superior District Court.

solvent surety, for whatever amount the judge may determine, as being equal to the value of the property to be left in his possession." C. P. 279.

We think this article means what it says. Its terms are general. Except in cases of failure, any sequestration may be released on bond. Had the law giver intended the relief granted by article 279 to apply only to sequestrations issued under article 275, a limitation to that effect would have been expressed in the article. If its meaning were doubtful, a liberal construction would be given, because the article is remedial in its character.

It is therefore ordered that the mandamus herein be made peremptory.

No. 4946.

STATE OF LOUISIANA ex rel. GARTHWAITE, LEWIS & MILLER v. THE JUDGE OF THE FOURTH DISTRICT COURT, Parish of Orleans.

Where the judge *a quo*, on a rule to show cause, answered: that several days after the rendition of the judgment by the jury, the defendant's counsel importuned him to sign a document tendered to him as a bill of exceptions; that respondent refused to sign the document presented, because it was not a bill of exceptions; that bills of exceptions can only be taken in civil cases during the trial; that they must show upon their face that they were signed at the trial, and that no bill of exceptions will lie after the trial and rendition of a verdict; that the counsel of the defendant on the Saturday previous to the Monday on which the verdict of the jury was rendered, did not ask to be allowed a bill of exceptions to the action of the court;

Held—That the respondent, in the main, assigned reasonable cause for declining to sign the bill of exceptions.

APPPLICATION for a mandamus directed to the judge of the Fourth District Court, parish of Orleans. *Labatt, Aroni & Clinton*, for relators. *Judge Lynch, in propria persona.*

TALIAFERRO, J. The relators complain that the judge of the Fourth District Court refused to sign a bill of exceptions taken on their behalf in a suit that was pending in that court, wherein J. H. Hopkins was plaintiff and Garthwaite, Lewis & Miller were defendants; that relators set forth that they are desirous of appealing from the judgment rendered against them in that case, founded upon the verdict of a jury, and that without the said bill of exceptions signed by the judge they would be unable to complete the transcript of appeal.

The following is the bill of exceptions relators complain the judge refused to sign:

"Be it remembered that on Monday, the thirtieth of June, 1873, immediately after the opening of this honorable court, and in presence of judge and jury, but before the reception and opening of their verdict and conclusions, and in order to preserve the rights of the defendants, so that they may not be prejudiced by silence, apparent

State ex rel. Garthwaite, Lewis & Miller v. The Judge of the Fourth District Court.

acquiescence or any omission, whether the said verdict be for or against them; that David C. Labatt, one of the defendant's counsel, in open court, in presence of judge and jury, heretofore sworn herein, then and there arose and excepted and objected to the reception of said verdict or sealed document by them presented on the following grounds:

“*First*—That by the minutes of the court of Saturday, June 28, 1873, in this case, which are made part hereof, this honorable court on said Saturday, after sending the jury into the jury room a second time to deliberate further, adjourned the court to Monday, June 30; that consequently there was intervening Sunday, twenty-ninth of June, on which the court could not and did not hold session, and did not intend to hold session, and by the terms of article 529, Code of Practice, the court was without lawful power or authority to direct a sealed verdict to be rendered in this case, or any other verdict, unless it adjourned to meet next day, and the same, whether sealed or not, is therefore absolutely null and void and vicious; that the court was in this case composed of judge and jury, and when the court adjourned on Saturday, only to meet again on Monday, the jury *ipso facto* was *functus officio* and *ex necessitate rei* defunct and discharged *quoad* this case, and utterly incompetent to render any verdict whatever.

“*Second*—That counsel for defendant did on said Saturday, just before the adjournment aforesaid, about 6:30 P. M., rise and inform the court that under the circumstances, as stated in the first ground above, a verdict obtained before twelve o'clock M. that night, unless the court was in session to receive it, or intended to be holden on Sunday, the next day, would be illegal, null and void; and counsel referred to the practice in this and other civil courts in that regard, and called upon the deputy clerk to state whether or not such was his experience, and to which he assented; but the court declined to receive any advice or suggestion, remarking that counsel was only acting in the interest of his client, who wanted the jury discharged, and that the point was not well taken, and persisted in refusing to discharge the jury.

“*Third*—That article 529, Code of Practice, is clear and distinct, and only permits a sealed verdict under certain circumstances, to wit: ‘When the court adjourns to meet the following day,’ which was not done in this case, and therefore the action of the jury was and is illegal, contrary to law, and *coram non judice* absolutely null and void, and should not be received or recognized by the court.”

To a rule to show cause, the judge of the Fourth District Court responds that upon the Monday following the adjournment of the court, on the evening of the previous Saturday, when the sealed verdict of the jury, previously returned to him at the hour of one o'clock

State ex rel. Garthwaite, Lewis & Miller v. The Judge of the Fourth District Court.

A. M. of that day, was about to be read in open court, the defendant's counsel rose and objected to the reception of the sealed verdict, and offered to read some document which he held in his hand, whereupon the counsel was informed by the court that he could not be permitted to read any document at that time or to prevent the reading of the verdict, and that the counsel was then informed that if there were anything irregular or illegal in the action of the jury or of the court, it would be ground that might be set up on a motion for a new trial, and in that way might be placed in the record and presented for examination by this court on appeal. The respondent says that several days after the rendition of the verdict by the jury, the defendant's counsel importuned him to sign a document tendered to him as a bill of exceptions, and alleged to be the same the counsel had offered to read on Monday previous before the court and jury; that respondent refused to sign the document presented; that it is not a bill of exceptions; that bills of exception can only be taken in civil cases during the trial; that they must show upon their face that they were signed at the trial, and that no bill of exceptions will lie after the trial and rendition of the verdict; that the counsel of the defendant, on the Saturday previous to the Monday on which the verdict of the jury was rendered, did not ask to be allowed a bill of exceptions to the action of the court.

We think the respondent, in the main, assigns reasonable cause for declining to sign the bill of exceptions tendered.

It is therefore ordered that the rule be discharged at the cost of the relators.

No. 4810.

STATE OF LOUISIANA v. GREGOIRE RUSSELL.

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The Attorney General has the right to designate an attorney at law to assist the attorney for the State, or to prosecute alone in certain cases.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. Gastinel*, for appellant. *A. P. Field*, Attorney General, for the State.

LUDELING, C. J. The defendant, having been convicted of the crime of rape, moved the court to arrest the judgment, on the ground that the prosecution was conducted entirely by an attorney at law, other than the Attorney General or district attorney of the State of Louisiana.

The Attorney General has the right to designate an attorney at law to assist the attorney of the State or to prosecute alone, in certain cases. See acts of 1872, pages 61 and 62. The motion was correctly overruled.

It is therefore ordered that the judgment be affirmed.

Dermani v. Home Mutual Insurance Company of New Orleans.

No. 2968.

ANTONIO DERMANI v. HOME MUTUAL INSURANCE COMPANY, of New Orleans.

Where the contract of insurance contained the following clause: "This policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer by sale or otherwise without such consent, this policy shall from thenceforth be void and of no effect;"

Held—That this prohibition does not apply to the assignment of the interests of one partner to the other, and that it can not be inferred to have been the intention of the contracting parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants, on pain of forfeiting the policy.

The prohibitory clause must be construed strictly, and if its application to the case before this court be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance.

It is true the clause expressly prohibits the transfer by sale or otherwise of the policy; but it does not expressly prohibit a change of interests among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other.

If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument and not left to inference, because a prohibitory clause can not be extended by implication.

In a contract of insurance, as in every other, it is the intention of the parties that must be considered. In the instrument before the court there is nothing to be found to warrant the conclusion that the plaintiff forfeited the policy by accepting the assignment of his partner's interest in the business, without the written consent of the defendants.

In the course of business partners often become dissatisfied, and change the firm by one party transferring his interest to the other, as was done in this case. This occurrence is so common, that these parties must be presumed to have contracted, knowing it might arise during the period of the insurance, and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument.

By the assignment in question no new party was introduced into the contract whom the defendants might not be willing to trust. In issuing the policy to Joseph H. Taboury & Co., they virtually declared the trustworthiness of each of the partners, so that it can not be objected that, by virtue of the assignment to plaintiff, the defendants were forced to insure a person they had not consented to trust.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Sambola & Ducros*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendants and appellants.

WYLY, J. The defendants appeal from the judgment condemning them to pay the plaintiff \$365 60 on a policy of insurance issued by them to the commercial firm of Joseph H. Taboury & Co., for \$4000 on their "merchandise, being stock in trade and on commissions contained in brick store situated on Front street, No. 27, and running back to Fulton street, No. 28." The plaintiff joins in the appeal and prays that the judgment be increased to \$731, the amount prayed for in the petition.

About four months before the fire occurred Joseph H. Taboury retired from the firm of Joseph H. Taboury & Co., and dissolved his copartnership with the plaintiff, and it was stipulated in the act of dissolution that the said Antonio Dermani was to take the entire stock of merchandise belonging to said firm, together with the lease of the store-

Dermani v. Home Mutual Insurance Company of New Orleans.

house occupied by them, on the following terms and conditions: "The said Antonio Dermani promises and binds himself to pay all the debts and liabilities of said firm without exception, amounting to \$3470 09."

* * * He also binds himself to pay the rent of said store when due, and also to pay Joseph H. Taboury the sum of \$725, \$362 thereof in cash, and the balance in thirty days. He was also authorized to collect all the claims and liquidate the affairs of the partnership.

If the partnership had continued there would be no question as to the liability of the defendants for the amount claimed. But in the contract of insurance we find the following clause: "This policy is not assignable unless by consent of this corporation, manifested in writing, and in case of any transfer, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

Under this prohibition the policy could not be transferred to a third party without the written consent of the insurers, so as to bind the latter or continue the risks. The question, however, is, does this prohibition apply to the assignment of the interests of one partner to the other? Was it the understanding of the parties that the plaintiff could not buy out his partner and continue the business, without the consent of the defendants, on pain of forfeiting the policy? The prohibitory clause must be construed strictly. And if its application to the case before us be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance. It is true, the clause expressly prohibits the transfer, by sale or otherwise, of the policy; but it does not expressly prohibit a change of interests among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other.

If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument, and not left to inference; because a prohibitory clause can not be extended by implication. Suppose Taboury had died, bequeathing his interests to his partner, the plaintiff, would that avoid the policy? Would the very purpose and object of the insurance be defeated simply because one of the partners in the course of nature should die, and his interest in the policy be transferred by succession to his heir or heirs? Surely not. Because such a transfer is not within the meaning of the prohibitory clause; and because it would be absurd to suppose the parties intended the conditional obligation of the defendants to perish by the death of one of the assured, an occurrence not within their power to prevent.

In the contract of insurance, like every other contract, it is the intention of the parties that must be considered. And in the instrument

Derman v. Home Mutual Insurance Company of New Orleans.

before us we find nothing to warrant the conclusion that the plaintiff forfeited the policy, by accepting the assignment of his partner's interest in the business, without the written consent of the defendants. In the course of business partners often become dissatisfied and change the firm by one partner transferring his interest to the other, as was done in this case. This occurrence is so common that the parties are presumed to have contracted knowing it might arise during the period of the insurance; and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument.

By the assignment in question, no new party is introduced into the contract whom the defendants might not be willing to trust. In issuing the policy to Joseph H. Taboury & Co. they virtually declared the trustworthiness of each of the partners. So therefore it can not be objected that by virtue of the assignment to plaintiff the defendants were forced to insure a person they had not consented to trust. 16 Barbour, S. C. R.; 512; 32 N. Y. 406; 13 N. Y. 412.

The other question is sufficiently answered in the written opinion of the judge *a quo*.

It is clearly proved that the plaintiff has sustained the loss complained of in the petition, and he should recover the amount prayed for.

It is therefore ordered that the judgment appealed from be amended so that it will amount to seven hundred and thirty-one dollars, and as thus amended that it be affirmed with costs.

No. 4794.

STATE OF LOUISIANA v. HENRY GIBSON.

The indictment for perjury in this case is fatally defective. It does not charge that the question which the defendant is alleged to have answered falsely was material to the case then being examined by the grand jury. It does not set forth the substance of the offense; nor charge that the defendant willfully made oath to a statement of material fact, which statement was false.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J.* Criminal case. *J. Pierson.* for defendant and appellant. *J. Bossier,* District Attorney pro tem., for the State, appellee.

WYLY, J. The defendant having been convicted of perjury appeals from the judgment sentencing him to hard labor for five years in the penitentiary.

The indictment charges: "That Henry Gibson, late of the parish aforesaid, on the fourteenth day of August, 1873, with force and arms,

in the parish, district, and State aforesaid, and within the jurisdiction of the Ninth Judicial District Court, while under oath as a witness before the grand jury, the oath required by law having been duly administered by J. A. Ducourneau, foreman of the grand jury, who had authority by law to administer said oath, and said Henry Gibson while so under oath and being questioned on certain matters under investigation in the case of the State v. Wheeler, stated falsely while so under oath, that he knew nothing about the hauling of any cotton from the warehouse of Belzare Slorems on or about the ninth day of November, 1872, and so the grand jury aforesaid, upon their oath aforesaid, do present that the said Henry Gibson, a witness before the grand jury as aforesaid, the foreman, J. A. Ducourneau, having sufficient authority to administer said oath, said Henry Gibson did in manner and form aforesaid, then and there commit willful and corrupt perjury contrary to the form," etc.

This indictment is fatally defective. It does not charge that the question which the defendant is alleged to have answered falsely was material to the case then being examined by the grand jury. It does not set forth the substance of the offense, nor charge that the defendant willfully made oath to a statement of material fact, which statement was false. Archibold, Criminal Pleading, vol. 3 page 542-12.

The motion in arrest of judgment should therefore be maintained.

It is therefore ordered that the judgment against the defendant be annulled and reversed, that the indictment herein be set aside.

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No. 2961.

GEO. W. CAMPBELL v. C. A. MILTENBERGER.

The plaintiff knew, as a chemist, that his iron fence, for which he had contracted with defendant, was joined together with material which would necessarily go to ruin, and he saw the ruin commencing within a year after the work was completed. It was then that he should have compelled the defendant to do his work in a proper manner.

It is not sufficient that plaintiff should have repeatedly called the defendant's attention to the bad condition of the fence; he should, as he could, have forced him to a compliance with his contract, and should not have waited seven years to claim, as damages, a greater amount than the fence originally cost. He is only entitled to recover from the defendant the amount which it would have cost to put the fence in a proper condition when it was first discovered that the material used was not suitable for the purposes for which it was intended.

The prescription of one year is not applicable to this case. It applies only to cases arising from damages caused by the commission of an offense or quasi offense.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Randolph, Singleton & Browne*, for defendant and appellant. *R. H. Marr & M. A. Foute*, for plaintiff and appellee.

MORGAN, J. Plaintiff contracted with the defendant to build him

Campbell v. Miltenberger.

an iron fence about his dwelling and premises. The fence was built at a cost of a little over \$1000. It was erected in 1861.

This suit was instituted in January, 1868. Its object is to recover from the defendant twelve hundred dollars as damages caused by what the plaintiff alleges to be the defective and improper construction of the fence. The trouble seems to be that the top and bottom bars were put on with sulphur, which, coming in contact with the air, forms sulphate of iron, and destroys the rods. Plaintiff says they should have been put on with lead, and this seems to be the opinion of the witnesses who testified on the trial of the cause. The fence was put up while the plaintiff was absent, but he returned shortly afterward, and he says that it was about a year after the work was done that he observed the decay. He is a physician, and, as he says, "necessarily acquainted with chemistry," and he says that the "formation of the sulphate of iron is a necessary consequence of the sulphur and iron having been in contact with dampness; it is impossible to place iron in contact with sulphur without forming sulphate of iron in dampness." He therefore knew, as a chemist, that his fence was joined together with material which would necessarily go to ruin, and he saw the ruin commencing within a year after the work was completed. It was then he should have made his complaint, and compelled the defendant to do his work in a proper manner. It could have been repaired at an expense of some two hundred dollars. He says he repeatedly called the defendant's attention to the condition of the fence, but this was not sufficient; he should, as he could, have forced him to a compliance with his contract. We think he can not be permitted to use the fence for seven years and then call upon the defendant for an amount of damages greater than the fence originally cost, and besides retain in his possession the materials of which it is made, worth, as scrap iron, some \$380. But he is entitled to something. It is contended on the part of the defendant that he used the material commonly employed in putting up iron fences. This may be so in some climates, but not in this one. It was an experiment here and it did not succeed, and the defendant knew it had failed in time to make it perfect. He should have done so. He pleads the prescription of one year, relying upon article 2295 C. C., which provides that "every person is responsible for the damage he occasions, not merely by his acts, but by his negligence, his imprudence, or his want of skill." This article governs cases arising from damages caused by the commission of an offense or of a *quasi* offense, and as the present action is not based upon the one or the other, it does not apply.

We think the plaintiff is entitled to recover from the defendant the amount which it would have cost to put the fence in a proper condition

Campbell v. Miltenberger.

when it was first discovered that the material used was not suitable for the purposes for which it was intended, say two hundred dollars.

It is therefore ordered adjudged and decreed that the judgment appealed from be amended by reducing the amount allowed to two hundred dollars with legal interest from judicial demand. Appellant to pay the costs in the district court; those of this court to be paid by appellee, and that as thus amended the judgment of the district court be affirmed.

Rehearing refused.

No. 3003.

A. C. DENOUVION v. REBECCA A. McNIGHT—W. C. HARRISON, garnishee.

A rule was taken by plaintiff on the garnishee in this case to show cause why he should not pay a certain judgment against defendant, because he had in his possession, notwithstanding his negative answer which was alleged to be false, property, rights and money of defendant to pay said judgment, and the garnishee on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in vacation. The exception was overruled, and the garnishee filed an answer in which he prayed for a jury. The exception should have been maintained; the issues presented were such as should have been submitted, if desired, to a jury.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley J. Charret & Duplantier*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for garnishee and appellant.

HOWELL, J. The plaintiff, having obtained judgment for \$8964 76 $\frac{1}{2}$, with interest against the defendant individually and as tutrix, issued garnishment process and propounded the usual interrogatories to Wm. C. Harrison as garnishee, who answered each interrogatory in the negative, whereupon plaintiff took a rule on him to show cause, on a day named, why he should not be condemned to pay the amount of said judgment; first, because his answers are neither categorical nor true, but *false*, evasive and *fraudulent* and calculated to screen the property of defendant from the pursuit of plaintiff; and second, because at the date of the service on the garnishee, he was the agent of defendant individually and as tutrix, and had and has now under his control and in his possession property, rights, money, etc., of defendant sufficient to pay said judgment. On the day named the garnishee excepted to the trial of the rule on the grounds, that, being a new suit against him, it could not be tried in vacation. The exception was overruled and the garnishee filed an answer in which he prayed for a jury and he deposited the jury fee. The jury was refused, the trial proceeded and the rule was made absolute, condemning the garnishee to pay \$7000, and he has appealed.

Denouviou v. Rebecca A. McNight.

Under the ruling in the case of *Hernandez v. James*, 23 An. 483, the exception should have been maintained; the issues presented are such as should be submitted, if desired, to a jury.

It is therefore ordered that the judgment appealed from be reversed, and that this cause be remanded to be proceeded in according to law. Plaintiff and appellee to pay costs.

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No. 4811.

STATE OF LOUISIANA v. GAETANO ROSA AND ROSA ROSA.

Where the bill of exceptions was to the putting of leading questions by the Attorney General to one of the witnesses under the pretense that the person testifying was an unwilling witness, and without having first propounded preliminary questions to the witness, and without a refusal by the witness to answer questions propounded to her in legal form on the examination in chief, which was permitted by the court, and all the leading questions were answered by the witness; and where the judge *a quo* subjoined to this statement in the bill of exceptions his own statement why he had permitted this course;

Held—That the circumstances which induced the judge *a quo* to permit the mode of interrogation used by the Attorney General constitute matter of fact which it is not necessary to examine, as upon the bill of exceptions the court thinks the ruling correct.

Where the exception was to the refusal of the judge *a quo* to send the jury back for further deliberation, after the jury had returned a verdict of guilty against the defendant Gaetano Rosa accompanied with the recommendation of mercy—the request being predicated upon the declaration of the foreman of the jury that, in rendering the verdict with recommendation to mercy, it was expected that the court might be enabled to inflict a milder sentence;

Held—That the exception is not well founded and must be overruled.

The court *a qua* decided correctly that the jury was sworn to bring in a verdict, and that the recommendation to clemency was mere surplusage.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. P. Field*, Attorney General, for the State. *D. M. C. Hughes*, for defendants and appellants.

TALIAFERRO, J. The defendants having been indicted and tried for the crime of arson, one of them, Gaetano Rosa, was convicted and sentenced to hard labor in the penitentiary during his natural life. From this judgment he has appealed. The other defendant, Rosa Rosa, was acquitted.

We are furnished with no brief in this case, nor is there a statement of facts presented. We find, however, two bills of exceptions. The first is to the putting of leading questions by the Attorney General to one of the witnesses, under the pretense that the person testifying was an unwilling witness, and without having first propounded preliminary questions to the witness, and without a refusal by the witness to answer questions propounded to her in legal form on the examination in chief, which irregular and illegal course was permitted by the court, and all the leading questions were answered by the witness. The court sub-

joins to this statement in the bill of exceptions that the witness had failed to obey the summons of the court and eluded the officers of the court aided by the police for several days, causing one continuance of the case. That when brought into court by attachment and placed upon the stand she hesitated to testify, and when she did, her answers were evasive and for the purpose of contradicting and covering up the testimony given before the recorder; that the demeanor of the witness on the stand satisfied him that she was an unwilling witness or in the interests of the defendants.

The circumstances which induced the judge *a quo* to permit the mode of interrogation used by the Attorney General, constitute matter of fact which it is not necessary to examine, as from the bill of exceptions we think the ruling correct. The other bill of exceptions is to the refusal of the judge to send the jury back for further deliberation, after the jury had returned a verdict of guilty against the defendant Gaetano Rosa accompanied with the recommendation of mercy, the request to send back the jury, for further deliberations being predicated upon the declaration of the foreman of the jury that in rendering the verdict with recommendation to mercy, the court might be enabled to inflict a milder sentence.

The court sustained the objections of the Attorney General to such a course, and decided correctly, we think, that the jury was sworn to bring in a verdict of guilty or not guilty, and that the recommendation to clemency was mere surplusage, founding its decision on the case of the State v. Bradley, 6 An. 555.

It is ordered that the judgment of the district court be affirmed.

No. 4406.

JAMES J. O'HARA v. SUCCESSION OF JOHN DAVIDSON.

The appeal in this case must be dismissed, because the thing demanded is a sum of money less than five hundred dollars, although the appellant contends that the court has jurisdiction, on the ground that the demand grows out of a contract between the plaintiff and the city of New Orleans for grading and shelling a long street, costing several thousand dollars, and that the validity of the contract is involved.

The obligation of the defendant sought to be enforced involves only the sum of two hundred and sixty-seven dollars and seventy seven cents. To this extent only the contract in question concerns him. The inquiry here is not as to the obligations of other front proprietors.

A PPEAL from the Second District Court, parish of Orleans, *Duvigneaud*, J. *S. P. Blanc*, for plaintiff and appellee. *Ogden & Hill*, for defendant and appellant.

WYLY, J. This is a suit for two hundred and sixty-seven dollars and seventy-seven cents for half the cost of a shell road constructed

in front of defendant's property on Locust street by the plaintiff, under a contract with the city of New Orleans, passed before Andrew Hero, Jr., on the eighth of June, 1872.

The plaintiff, the appellee herein, moves to dismiss the appeal because :

First—This court is without jurisdiction, the matter in dispute being less than five hundred dollars.

Second—The bond is insufficient for a suspensive appeal.

On the first ground we think the appeal must be dismissed, because the thing demanded is a sum of money less than five hundred dollars. The appellant, however, contends that the court has jurisdiction, because the demand grows out of a contract between the plaintiff and the city of New Orleans for grading and shelling a long street, costing several thousand dollars, and the validity of that contract is involved.

The obligation of the defendant sought to be enforced involves only the sum of two hundred and sixty-seven dollars and seventy-seven cents. To this extent only the contract in question concerns him. Whether the obligation of the defendant arises out of the same instrument that several obligations of other persons arise, or whether it springs from a separate contract, is immaterial. The inquiry here is not as to the obligations of other front proprietors. For aught that appears in the record they all may be discharged.

The question is, what is the amount involved in the legal obligation sought to be enforced against the defendant? It is a sum of money less than five hundred dollars.

In *Rooney v. Brown*, 21 An. 51, the question was whether the defendant was bound to pay four hundred and twenty-one dollars and sixty-three cents, for curbing and gutter built in front of his property in the city of Jefferson under a contract with the city adjudicated to the plaintiff pursuant to an ordinance; and the suit was dismissed because the amount in dispute was less than five hundred dollars. Doubtless the amount of the contract in that case between the plaintiff and the city was largely over five hundred dollars; but the obligation of the defendant arising by operation of law, in view of that contract, was less than that amount.

In this case the contract between the plaintiff and the city involved several thousand dollars, and it produced a conventional obligation against the latter for an amount doubtless exceeding five hundred dollars. But the obligation sought to be enforced against the defendant is not a conventional obligation. The defendant was not a party to the instrument. It is an obligation arising by operation of law, in view of the adjudication, the contract and the construction of the work in front of defendant's property on Locust street.

The case of *Williams v. Vance* 2 An. 909, is not in point. There the defendant was sued on a note for two hundred and forty-seven dollars and fifty cents, being one of a series given to the plaintiff for a tract of land. He pleaded failure of consideration, and that he had been deceived and defrauded by the plaintiff in the contract of sale. He prayed for judgment in his favor upon the note sued upon, and for a decree that the other notes be returned and the contract rescinded. There the defendant demanded the rescission of the sale, and his interest in that contract largely exceeded the amount necessary for the appellate jurisdiction of this court.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 3023.

C. J. O'HARA v. N. SCHWAB et al.

Pothoff & Knight instituted a suit against Hill, the drawer of a note, obtained judgment, issued execution, and on the judgment not being satisfied, sued O'Hara the indorser, who, after judgment against him, paid the amount thereof. The present suit is brought by O'Hara against the sheriff and his sureties to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission amounting to malfeasance and nonfeasance in office.

The error in this case lies in the assumption that there was any subrogation in the judgment of Potthoff & Knight against O'Hara, to any right which Potthoff & Knight had against Schwab and his sureties by reason of any neglect, if neglect there was, in executing the *feri facias* which had been placed in his hands. The sheriff may have been responsible to them, but he was not responsible to O'Hara, who was no party to the suit from which execution issued.

Therefore the conduct of the sheriff in the case of Potthoff & Knight v. Hill can not give rise to any action against him and his sureties in the case of Potthoff & Knight against O'Hara.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Billings & Hughes*, for plaintiff and appellee. *Hawkins & Tharp, Cunningham* and *J. J. Roman*, for defendants and appellants.

MORGAN, J. Potthoff & Knight owned a note for seven hundred and twenty-four dollars, drawn by S. L. Hill to his own order and indorsed by C. J. O'Hara. The note not having been paid at maturity, Potthoff & Knight sued Hill, in February, 1868, and obtained judgment against him. Execution issued thereon, and property, both real and personal, said to belong to Hill, was seized; but the property does not appear to have been sold.

O'Hara, the indorser on the note, was sued in New Orleans on the fourteenth April, 1869. He answered that the sheriff of Jefferson had seized real and personal property belonging to Hill sufficient to satisfy the judgment which had been rendered against him; that thereafter

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Hill paid one hundred dollars, and gave his notes payable in installments at from two to eight months for the balance, and that thereupon Hill was granted a delay and stay of proceedings, and accepted the notes as payment and discharge of the original note, which operated his complete and final release and discharge from any liability. Judgment was rendered against him. It was satisfied.

This suit is instituted against Schwab and his sureties on his bond to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission by which the sheriff made himself responsible, and as his sureties are bound with him for his malfeasance and nonfeasance in office, he asks a judgment against them for the amount he has been compelled to pay. There was a decree in his favor and the defendants have appealed.

The error lies in the assumption that there was any subrogation in the judgment of Potthoff & Knight against O'Hara, to any right which Potthoff & Knight had against Schwab and his sureties by reason of any neglect of his, if neglect there was, in executing the *feri facias* which had been placed in his hands. The sheriff may have been responsible to them, but he was not responsible to O'Hara who was no party to the suit from which execution issued. Potthoff & Knight controlled the judgment which they had obtained against Hill as well as the *feri facias*; they could have let the first lie dormant or have caused the second to be returned, or they could have ignored the principal altogether and sued the indorser primarily, for he was responsible without regard to the maker of the note.

Therefore, the conduct of the sheriff in the case of Potthoff & Knight v. Hill, can not give rise to any action against him and his sureties in the case of Potthoff & Knight against O'Hara.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants with costs in both courts.

No. 4989.

LAPENE & FERRE v. EDWARD MEEGEL; JOHN H. MCKEE v. EDWARD MEEGEL—Consolidated with interventions and third oppositions of GREVE, WILDERMAN et als.

The recording of a privilege too late, is equivalent to not recording it at all, so far as the seizing creditors are concerned; and recording it after the property upon which alone it can be executed has been seized and taken possession of by the sheriff and thus put away from the control of the defendant, does not affect the seizing creditor's rights.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J. J. S. Goode*, for plaintiffs and appellees. *Kennard, Howe & Prentiss* and *E. W. Blake*, for appellants.

MORGAN, J. Plaintiffs, judgment creditors of defendant, seized under *fieri facias* certain sugars and molasses, portion of the crop of 1873, the sugar and molasses being at the time of seizure in defendant's sugarhouse. The seizure was made on the thirteenth November, 1873. The sugar and molasses were sold, and the contest now is between plaintiffs and third opponents, as to whom the proceeds shall go.

Greve & Wilderman claim a privilege on the proceeds on the ground that they are commission merchants, and that they made the advances and furnished the supplies which were necessary to enable the defendant to make the crop.

Nelson and others claim the privilege of laborers who cultivated and took off the crop.

A motion has been made to dismiss the appeal in so far as Nelson and his co-laborers are concerned, because his and their individual claim does not exceed five hundred dollars. But the aggregate amount of their claims greatly exceeds that sum. The fund, too, to be distributed, exceeds that amount. We think the motion to dismiss should be denied.

Greve & Wilderman allege that defendant's indebtedness to them was recorded on the seventeenth November, 1873.

The pay roll showing the respective amounts due to Nelson and others was recorded on the fourteenth November, 1873.

The seizure, under plaintiffs' *fieri facias* was made, as we have seen on the thirteenth November, 1873.

In the case of *White v. Bird*, 23 An. 270, where the sugar and molasses made on the plantation of Bird having been seized, and where Thibaut, a commission merchant, filed a third opposition, alleging that his claim for supplies furnished for the use of the plantation was a privileged debt, it was said "the account of the third opponent has not been recorded. He can not, therefore, assert any privilege so as to affect the rights of the seizing creditors."

Lapene & Ferre v. Meegel. McKee v. Meegel.

In the case of *Loeb v. Blum*, 25 An. 232, it was held "as between Spor, the consignee, and Loeb & Co., the latter, as seizing creditors, are to be paid first. Assuming that Spor has the privilege which he claims, but with regard to which we do not consider it necessary to express any opinion, still it was not recorded prior to Loeb's seizure, and can not, therefore, prevail against it." We think that the recording of a privilege too late, is equivalent to not recording it all, so far as seizing creditors are concerned, and that recording it after the property upon which alone it can be executed has been seized and taken possession of by the sheriff, and thus put away from the control of the defendant, does not affect the seizing creditors' rights.

Judgment affirmed.

No. 4629.

CITIZENS' BANK OF LOUISIANA v. A. DUBUCLET, State Treasurer.

The Citizens' Bank obtained, by mandamus proceeding against the State Treasurer, a judgment in the Superior District Court ordering him to pay the bank \$200,000, and the plaintiff now prays that an injunction issue to restrain the Treasurer from paying any warrant or warrants out of the general fund, until he shall have paid the petitioner the said sum of \$200,000.

The position taken as to the right to question in this suit the validity of plaintiff's claim, which is based on a final judgment, is correct; but the remedy sought by injunction can not be accorded. This is not the mode of enforcing or executing a judgment in a mandamus suit.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins J. A. Pitot, Finney & Miller*, for plaintiff and appellant. *A. P. Field*, Attorney General, *J. Q. A. Fellows & Whitaker*, for defendant and appellee.

TALIAFERRO, J. The Citizens' Bank alleges that in July, 1872, it had obtained by mandamus proceeding against the State Treasurer a judgment of the Eighth District Court of New Orleans, ordering him to pay the bank \$200,000, with eight per cent. interest from twenty-seventh February, 1872, being the amount of State warrants issued in its favor in payment of an equal sum loaned to the State to pay the per diem of the members of the Legislature, which warrants were issued under authority of the statute No. 12, approved twenty-sixth February, 1872, entitled "An act to amend an act entitled an act defining the distances from the domiciles of members, etc., and making an appropriation to defray the expenses of the General Assembly and to repeal act No. 52 of 1869." The act of twenty-sixth February, 1872, the plaintiff shows, provides "that warrants shall be paid out of any money in the treasury to the general fund, and out of the first money which shall be paid into the treasury to the credit of the gene--

ral fund, until all the warrants issued under the appropriation made in this act shall have been paid." The plaintiff complains that notwithstanding the judgment so obtained against the Treasurer, he has failed and refused to pay the bank any money. The plaintiff alleges that large amounts have been paid into the treasury, and other warrants paid by the Treasurer, to the great injury of the plaintiff. The plaintiff prayed that an injunction issue to restrain the Treasurer from paying any warrant or warrants out of the general fund until he shall have paid the petitioner the said sum of \$200,000, with interest correspondingly with the amount paid to the district judges since the rendition of the judgment in favor of plaintiff on the third July, 1872, and not to pay any judicial salary for the future without paying to petitioner its proportion of the funds in the treasury upon an equal footing and rank with the judges.

There was an order rendered to show cause, and a preliminary restraining order issued until the rule nisi should be tried. Several interventions were filed offering the prayer of the petition to enjoin the Treasurer, as asked by the plaintiff. The Attorney General, on behalf of the State and the Treasurer, excepted that act No. 12 of 1872, and especially the second section of the act, is unconstitutional and void, inasmuch as the subject matter of that section is not expressed in the title; that the duties of the Treasurer, as required of him in the pleadings, are not merely ministerial, but of an executive character, and not such as a court can take cognizance of; that for his acts he is responsible alone to the Legislature for any failure in the performance of his duties or for any misfeasance in office, and to the parties injured in damages; that the petition and interventions set forth no cause of action; that neither law nor equity authorizes any warrant on the general fund to be paid in preference to any other warrant on the same fund, only that each should be paid in the order in which they were drawn, the first warrant or that of oldest date to be paid first out of any moneys which are in or may first come into the treasury.

On these issues the case was tried. The injunction was refused and the interventions dismissed. From this judgment the plaintiff, the Citizens' Bank, alone has taken the appeal.

It seems that the title to the act of twenty-sixth of February, 1872, does not express all its objects in its title. It is "An act to amend an act entitled an act defining the distances from the domiciles of the members of the General Assembly to the State House, fixing the mode of ascertaining the per diem of members of the General Assembly for the time engaged in going to and returning from the State House and their mileage to be paid, and the number of employes of the General

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Assembly and their compensation, and defining their duties, and making an appropriation to defray the expenses of the General Assembly, and to repeal act No. 52 of 1869."

One of the objects, and the primary one, of this act is to borrow \$200,000, which the second section of the act authorizes the Governor to do. We think it is in repugnance with article 114 of the constitution of the State, which declares that "every law shall express its object or objects in its title." The act does not express the purpose to borrow \$200,000.

The injunction sought for by the plaintiff would operate an interference with and a control of the functions of the State Treasurer not warranted by law. The act required of him is not merely ministerial. 17 An. 311; 15 An. 334; 21 An. 352. We think the decree of the lower court correct.

It is therefore ordered that the judgment of the Superior District Court be affirmed with costs.

ON REHEARING.

HOWELL, J. Counsel for the bank press upon our attention the fact that the correctness and recognition of the claim herein against the State was definitively settled by a judgment of the Eighth District Court for the parish of Orleans, on the third of July, 1872, in the mandamus suit against the State Treasurer, represented therein by the Attorney General, who at the same time represented the State, and contend that as the said judgment is final, the unconstitutionality of the act authorizing the debt can not be raised in this proceeding, the object of which is only to enjoin the Treasurer from paying any one until he shall have complied with the judgment in the said mandamus suit by paying the plaintiff herein.

This position as to the right to question in this suit the validity of plaintiff's claim is correct, but the remedy sought by injunction can not be accorded. This is not the mode of enforcing or executing a judgment in a mandamus suit.

The injunction was properly disallowed in the lower court; but as the judgment in favor of the bank in the mandamus proceeding is final and conclusive as to the existence and legality of the claim, we erred in making the constitutional question the reason for our affirmance of the said decree on the injunction. And we deem it unnecessary to express an opinion now upon the right of a court of justice to enjoin the State Treasurer from paying certain parties to the prejudice of others, setting up an alleged legal preference.

For the reason herein given, it is ordered that our former decree affirming the judgment of the lower court remain undisturbed.

No. 4766.

JAMES FOULHOUSE v. MYRA CLARK GAINES

The plaintiff, a judgment creditor of defendant, Mrs. Gaines, issued execution and instituted garnishment process against the city of New Orleans, the latter being a judgment debtor of Mrs. Gaines by virtue of a judgment and decree of the United States Circuit Court.

The plaintiff moved that the city of New Orleans and other garnishees show cause why the said city of New Orleans should not be condemned and ordered to pay to the sheriff the amount of plaintiff's judgment and *feri facias*, on the ground that by their answers it was shown that the city had sufficient funds to pay.

On the trial, a bill of exceptions was taken by the plaintiff to the ruling of the court sustaining objections to the introduction in evidence by plaintiff of a certified copy of the *feri facias* issued in the case of Mrs. Gaines v. The City of New Orleans in the United States Circuit Court, together with the returns on the *feri facias* and to all evidence whatever in support of the averments made in the rule.

The objections were, that plaintiff could not proceed summarily by rule against said garnishees; that they were entitled to trial by jury; that the granting of the order asked for would interfere with the exclusive jurisdiction of the United States Circuit Court and bring the State court in conflict with it.

The court *a qua* erred. If entitled to a jury, the garnishee, city of New Orleans, went into the trial without praying for one. She was a mere stakeholder in this case without interest on her part as to whom payment should be made.

The evidence erroneously rejected was intended to show that the *feri facias* held by the United States Marshal was returned into court unsatisfied in whole; that no property was found to seize, and that nothing was made on the writ. The Circuit Court of the United States had exercised its authority in the rendition of the judgment. That judgment was the property of Mrs. Gaines, and like any other property she owned, was liable to seizure by her judgment creditors. It is impossible therefore to perceive how a conflict of jurisdiction could arise from the proceedings on garnishment.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. E. Howard McCaleb*, for plaintiff and appellant. *Lacey*, city attorney, and *Walsh*, assistant city attorney, for the city of New Orleans. *Fellows & Mills*, for S. M. Todd; *Clarke, Bayne & Renshaw*, for A. Schreiber, garnishees.

TALIAFERRO, J. The plaintiff having obtained judgment against the defendant for the sum of ten thousand dollars, with legal interest thereon from the fourteenth of September, 1871, issued execution and instituted garnishment process against the city of New Orleans, the latter being a judgment debtor of Mrs. Gaines for \$125,266, as fixed by a judgment and decree of the United States Circuit Court. A. Schrieber, S. M. Todd, and S. B. Packard, United States Marshal, were also cited in garnishment. The city of New Orleans answered, that at the time of seizure and answer, it was indebted to Myra Clark Gaines in the sum of \$125,266 79; that the judgment has been seized by sundry persons; that the following seizures are recorded in the office of the Administrator of Public Accounts, viz: *James Emott v. Myra Clark Gaines*, in October, April and August, 1873; that the said judgment in favor of Mrs. Gaines and against the city of New Orleans (as per notice from them dated twenty-fifth November, 1872), had been

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assigned to A. Schrieber and S. M. Todd; that a seizure had been made in the suit of A. B. Magruder and J. V. Chilton, v. Mrs. Gaines, No. 25,359, of the docket of the Fourth District Court; that Rhoda E. White had given notice on the eleventh of April, 1873, to the city to retain for her fifteen per cent. of the sum due to her by Mrs. Gaines by virtue of an alleged mortgage. A. Schrieber answered that as trustee, with S. M. Todd, there may at some future date be a balance in his hands, subject to the order of Mrs. Gaines, of which the nature, description and amount, if any, is unknown to respondent. S. M. Todd answered: I am one of the two trustees to whom was transferred and assigned on the twenty-fifth of November, 1872, a certain judgment in favor of Mrs. Gaines against the city of New Orleans for \$125,266 79, and all moneys that may be collected or received thereon; to pay first, James Emott \$40,000, with seven per cent. interest from the first of November, 1872; and after the same is satisfied, to pay the residue to Mrs. Gaines or her order; that previous to the service of these interrogatories I had received and accepted orders from Mrs. Gaines to pay a portion of the proceeds of said judgment to other parties; also claims of parties claiming privilege and garnishment to satisfy judgments against Mrs. Gaines, in all amounting to \$120,000. Should, however, the judgment against the city of New Orleans, with interest thereon, be paid in full into the hands of this respondent, there will probably be left, after satisfying the claims above alluded to, a sufficient sum to satisfy the writ of *fieri facias* issued in this case, unless there should be attorneys' liens and other claims having preference, of which respondent knows nothing. S. B. Packard, the United States Marshal, answered that he holds an execution in favor of Mrs. Gaines against the city of New Orleans for said sum of \$125,266 79, but has made no seizure under it; that claims have been made against said sum as follows: Race, Foster & Merrick, attorneys, for \$10,000; A. Schrieber and S. M. Todd, trustees and assignees of the judgment; Rhoda C. White fifteen per cent. Schrieber, Todd and Packard, answered that they had received no moneys or property for and were in no manner indebted to Mrs. Gaines or her assigns of the judgment, or by virtue of the trust or pledge in favor of Emott.

Upon these answers being made, the plaintiff proceeded by rule against the city to show cause why it should not be condemned to pay the plaintiff's demand. In support of the motion various grounds were stated. Among these the principal are: That by its answers the city shows that it is indebted to defendant in a sum exceeding the amount of plaintiff's judgment; that the answers of Schrieber and Todd show that the transfer to them is a mere trust, and that, for a sum far less than the debt due to the defendant by the city, and if the

beneficiary, Emott, was paid, there would remain a balance of \$85,000 due Mrs. Gaines.

That the answers disclose explicitly no other charge on the fund except the sum due Emott, \$40,000; that due Race, Foster & Merriok, \$10,000, and a sum due Magruder & Chilton. That in regard to every other claim against the fund the answers are not categorical, but evasive and contradictory, and must be construed against the city. That beyond the amount due Emott, the transfer is a confessed simulation.

To this motion the city filed an exception, setting forth: That the present proceeding is not cognizable by the court under a rule or summary proceeding. In its answer the city contended: That Todd and Schrieber, Magruder, Chilton and Rhoda E. White, whose claims would absorb the whole fund, and who assert a superior privilege, should be made parties to the rule, and prayed that they be made parties by service of the rule and answers.

On trial of the rule the court ordered it to be discharged. The plaintiff has appealed.

A bill of exceptions was taken by the plaintiff to the ruling of the court sustaining objections to the introduction in evidence by the plaintiff of a certified copy of the *fiery facias*, issued in the case of Myra Clark Gaines v. The city of New Orleans, No. 2695, United States Circuit Court, District of Louisiana, together with the returns on the *fiery facias*, and to all evidence whatever in support of the averments made in the rule. The objections were: That plaintiff could not proceed summarily against them by rule. That they were entitled to trial by jury. That the granting of the order asked for would interfere with the exclusive jurisdiction of the United States Circuit Court and bring this court in conflict with it.

We think the court erred. The document annexed to the bill of exceptions shows that the *fiery facias* held by the United States Marshal was returned into court unsatisfied in whole; that no property was found to seize, and that nothing was made on the writ. We do not perceive that a conflict of jurisdiction could arise from the proceedings in garnishment. The Circuit Court of the United States had exercised its authority in the rendition of the judgment. A *fiery facias* had been issued and returned *nulla bona*. The judgment was the property of Mrs. Gaines, and, like any other property she owned, was liable to seizure by her judgment creditors. If entitled to a jury, the city went into the trial without praying for one. She was a mere stakeholder in this case, without interest on her part to whom payment should be made.

We conclude that it is clear from the answers of all the garnishees

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that over and above the amounts of well established claims to be satisfied out of the proceeds of Mrs. Gaines' judgment, and which have priority over the plaintiff's claim, there remains a sufficient sum to pay and acquit his demand, and that he has by his garnishment process secured it. Code of Practice, articles 246, 642.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff have and recover from the city of New Orleans as garnishee the sum of \$10,000, with legal interest thereon from the fourteenth September, 1871, with costs in both courts.

Rehearing refused.

No. 3074.

CHARLES ZAPATA v. HONORINE CIFREO AND ELIZA BOUGERE.

When a note is negotiable, it is competent for plaintiff, in his capacity of agent, to treat the instrument, as between himself and all other persons except his principal, as his own. In this case the defendants have shown no equitable grounds of defense they were entitled to set up against the maker of the note.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. W. O. Denegre*, for plaintiff and appellee. *E. Bermudez*, for defendants and appellants.

TALIAFERRO, J. On the fifteenth May, 1857, one B. Guignon executed a promissory note for \$2000, due two years after date, and drawn payable to his own order and by him indorsed. Its payment was secured by special mortgage on property in New Orleans. This note became the property of Pierre Morrisot, who afterwards transferred it to the plaintiff.

It seems that Guignon, the maker of the note, in a settlement with the defendants after the death of their mother, whom Guignon had married, transferred to them a number of lots and buildings, and in consideration thereof they obligated themselves to pay and discharge in the place of Guignon the note for \$2000 with the interest thereon. The object of this suit is to enforce the payment of the note against the defendants under their obligation to pay it. The plaintiffs pray judgment against them accordingly and that their right of mortgage be recognized, etc.

Honorine Cifreo, one of the defendants, assisted by her husband, denies any indebtedness on her part in relation to the demand of the plaintiffs, and avers that by special act of agreement with Eliza Bougere, the other defendant, the latter had obligated herself to pay the aforesaid obligation and release Mrs. Cifreo; that all claims against the succession of their mother, of which the note in question appears

to have been one, the said Mrs. Bougere had assumed to pay, and the respondent prayed that as to her the plaintiff's demand be dismissed.

The other defendant put in a general denial, and specially denies that the plaintiff is the owner of the note sued upon, and avers that it is owned by Morrisot, who is dead; that his succession has not been opened and against which the defendant has valid defenses. She pleads the prescription of five years, and avers that any stipulations she may have made concerning the note were not intended for the owner thereof, but for the benefit of the original debtor to whose rights and obligations defendant has succeeded. Judgment was rendered in favor of plaintiff and defendants have appealed.

The defense appears to be that Zapata, who sues, can not avail himself of the stipulation in favor of Morrisot unless he shows an assignment of the rights of Morrisot to the note and mortgage. That the plaintiff in a motion for a new trial styled himself as agent; that he can not provoke a judgment as he has not disclosed the name of his principal. That Mrs. Bougere the principal defendant who was bound to pay the debt to Morrisot in place of Guignon the original obligor, and in the same manner that he was bound, can no longer be held liable, as whatever stipulations she may have made since May 1857, the date of the note, having remained unaccepted, prescription has accrued in her favor as it evidently has in favor of Guignon the original obligor.

We think these pleas can not avail the defendant. The note is negotiable. It was competent for the plaintiff, as agent, to treat the instrument as between himself and all other persons except his principal, as his own. Story on Bills sec. 198. In the case of *Banks v. Easton* 3 N. S. 291, Judge Porter said: "The blank indorsement makes a bill transferable by the indorsee and every subsequent holder by mere delivery, and so long as the indorsement continues in blank it makes the bill or note payable to bearer. It appears to us, therefore, that whether plaintiff was the owner of the note sued on or not was a question with which the defendant had nothing to do, for by virtue of the blank indorsement the holder was entitled to recover from the defendant, if not as real owner at least as trustee for the person having the real interest. There are exceptions to the general rule where the defendant has equitable grounds of defense of which he apprehends an attempt is made to deprive him by an assignment which is not *bona fide*, or when the note has been lost and the plaintiff can not account how he came by it. But when no such obligations are made, the holder of the note is entitled to recover, and a judgment in his favor will form *res judicata* against any other person claiming an interest in the bill, for the indorsement in blank makes the note payable to bearer."

Zapata v. Honorine Cifreo and Eliza Bougere.

In the case at bar the defendants have shown no equitable grounds of defense they were entitled to set up against the maker of the note.

Next, as to the plea of prescription. It is shown clearly that there was a complete recognition of the debt, and an assumption to pay it by the defendants on the eighth of February, 1864, four years and nine months after the maturity of the note. By public act on the seventeenth of January, 1867, already referred to, the defendants in an act of partition recognized this debt, and Mrs. Bougere obligated herself to pay it. Citation was served on her on the eighteenth of February 1870. The plea of prescription is therefore unavailable.

It is ordered and adjudged that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 4852.

SUCCESSION OF CALEB WHITTINGTON.

26	89
106	447

The language of the notary in the *proces verbal* of a will, "that the said testator, being illiterate, signs his mark," does not meet the requirements of article 1579 C. C., which prescribes that this declaration must be made by the testator himself.

In this instance, the testator has not declared that he knows not how to sign, nor has express mention of that declaration been made in the will. His testament is therefore null and void.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Hornor & Benedict*, for plaintiff and appellant. *Randolph, Singleton & Browne*, for third opponents. *Paul Théard*, for the absent heirs, appellees.

LUDELING, C. J. Caleb Whittington died in November, 1872. He left what purported to be a nuncupative will by public act, by which Thomas Duffy was constituted his universal legatee. The probate and registry is opposed by the legal heirs. The district court declared the will null and void.

The objection urged against the validity of the will is that the testator, not having signed the will, the notary undertook to declare the cause of the non-signing. The language of the notary in the *proces verbal* of the will is, "the said testator, being illiterate, signs his mark,"—and that this does not meet the requirements of article 1579. We think the objection fatal. Conceding that the word illiterate means that the testator did not know how to sign his name, would not help the universal legatee's case, for article 1579 requires this declaration to be dictated or made by the testator himself.

The article declares that "this testament must be signed by the testator. If he declares that he knows not how, or is not able to sign,

Succession of Whittington.

express mention of his declaration, as also of the cause that hinders him from signing, must be made in the act."

The cases of *Stafford v. Stafford*, 12 La. 449, *Shannon et al. v. Shannon's executor*, 16 An. 9, and *Brand v. Baumgarden*, 24 An. 623, do not support the views of the universal legatee.

The testator has not declared that he knows not how to sign, nor has express mention of that declaration been made in the will. The testament is therefore null and void. *Marcadé*, 4 vol., p. 22, edit. 1855.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

No. 4566.

CORNELIA HART, Tutrix *v.* HOSS & ELDER, Administrators. T. E. HART *v.* the same. (Consolidated.)

Under the first section of the civil rights act, the sixth article of the Constitution of the United States, and the State Constitution of 1864, title 1, art. 1, Cornelia Hart, a colored person, was vested in November, 1867, with the right to enter into a contract of marriage, and her marriage at that epoch with C. E. Hart, a white man, was clothed with all the formalities required by law—which marriage, if there existed any doubt as to its validity, would have to be considered as ratified and confirmed by art. 149 of the State Constitution of 1868.

In 1867, when the marriage of Cornelia Hart was effected, the incapacity attaching to her children under former laws, of being legitimated on the ground of the legal inability of their parents to contract marriage at the time of the conception of the children, had been obliterated.

It is considered well settled that other modes of the acknowledgment of illegitimate children, besides that by notarial act, are authorized by the laws of this State. Any alteration made in the Code of 1870 as to this matter, could not affect the rights of the children of Hart, which were fixed in 1867.

The fact that C. E. Hart, now deceased, had acknowledged as his children the issue of his cohabitation with Cornelia, is sufficiently established to enable this court to decide that they were capable of inheriting from their father at the time of his decease in 1869.

A PPEAL from the Parish Court of the parish of Caddo. *Smith, J. Land & Taylor*, for plaintiff and appellee. *Egan, Williamson & Wise*, for T. E. Hart et al., and for administrator Nathan Hoss, appellants.

TALIAFERRO, J. Two sets of litigants, claiming adversely to each other a large succession opened in the parish of Caddo in 1869, brought these suits against the two administrators of the estate, claiming it as heirs and praying to be put into possession of the property of the estate. One of the suits is brought in behalf of her children by Cornelia Hart, alleging that she is the widow of E. C. Hart, deceased, and natural tutrix of her minor children, issue of her marriage with the said Hart, and that they are the legal heirs of their father. The other suit was instituted by various persons, setting themselves up as the

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nearest relatives of E. C. Hart and entitled to his estate as collateral heirs. The administrators answered separately. One of them, Elder, answered by general denial. Hoss, the other administrator, specially denies the rights claimed by the tutrix for her minor children, and avers specially that the plaintiff being a woman of color, she was prohibited by law from marrying E. C. Hart, and that her children could not be legitimated by a marriage subsequent to their conception and birth. He further averred that one Theodore Hart and others claimed to be the heirs of E. C. Hart, deceased. The two suits were consolidated and tried together in the parish court. Judgment was rendered in favor of the tutrix, recognizing her as the lawful wife of E. C. Hart, deceased, and the children represented by her as the legitimate children and heirs of E. C. Hart, ordering that the tutrix be put into possession of the property of his estate, and rejecting the pretensions of Theodore Hart et al. From this judgment Hoss, one of the administrators, and Theodore Hart and his co-plaintiff, have appealed.

There is an exception by the administrator Elder to the jurisdiction of the court *quoad* the suit of Theodore Hart et al. on the ground that the plaintiffs in that case are claiming adversely to Cornelia Hart, tutrix, a succession worth more than five hundred dollars. In each suit the plaintiffs are claiming to be heirs of E. C. Hart, deceased, and pray to be recognized as such and to be put into possession of his estate. Their claims are adverse to each other.' But neither is suing the other for the succession. The issue before the court is, which of the parties plaintiffs, if either, are the heirs of E. C. Hart. The leading question is, which of these parties, if either, shall be recognized as the heirs of the decedent. The parish court clearly has jurisdiction. Code of Practice, articles 1000 and 1003.

The material facts elicited by this litigation are, that E. C. Hart, whose succession forms the bone of contention, lived a number of years in concubinage with the plaintiff Cornelia, a woman of color. Several children, all minors at the time of Hart's death in 1869, were the fruit of this intercourse. In November, 1867, Hart and Cornelia were married in Shreveport, about eighteen months before the decease of Hart. This marriage was solemnized by a Roman Catholic priest in accordance with the forms of the Roman Catholic Church. A regular *proces verbal* of the ceremony of marriage was made out and signed by the parties to the marriage, by three witnesses and by the priest who officiated. No marriage license was issued, and no return was made of the act of celebration for record.

Subsequently the children were baptized by the same priest, of which he furnished a certificate. At the baptism the father was not present, but it is shown that it was done at his instance and by his consent

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The plaintiff Cornelia, was confirmed natural tutrix of her minor children, representing them to be the legal heirs of E. C. Hart, deceased. Letters of tutorship were issued to her and an under tutor appointed.

The ground assumed in this controversy by Theodore Hart and others claiming as the collateral heirs is, that at the date of the alleged marriage between E. C. Hart and Cornelia the plaintiff, marriage between a white person and a person of color was prohibited by the laws of Louisiana, and that the pretended marriage of those persons was null as having been entered into in violation of a prohibitory law. They urge that the marriage was a "private marriage" in the sense of the statute of 1868, No. 210, pages 278 and 279; that proof of that class of marriages can only be made by notarial act executed by the parties in conformity with the provisions of that act. They further contend that aside from the question of color, the illegitimacy of the children, arising from their having been born out of wedlock operates an incapacity to inherit which can only be removed by legitimation in the manner prescribed by law, and refer to Civil Code, articles 180, 198 and 200. They assumed from these articles and from the statute of 1870, entitled "An act to authorize natural parents to legitimate their natural children (acts of 1870, p. 96) that legitimation of the children of E. C. Hart could be made only by the formal acknowledgment by the father in an act passed before a notary and two witnesses. They aver that such proof has not been made in this case and they stand upon the inadmissibility of any other species of proof to establish their legitimacy, referring to articles 198 and 200 of the Civil Code.

On the other side it is argued that at the date of the marriage of E. C. Hart to Cornelia there was no law of Louisiana prohibiting the marriage; that the children of that marriage may and have availed themselves of the existing laws of the State to establish their legitimacy and their right to inherit their father's estate. Civil Code, articles 208 and 209. It is contended in their behalf that if, at any time prior to the marriage of their parents, there existed an incapacity in them to occupy the status of legal heirs, that incapacity was removed by the passage by the Congress of the United States, of the act of April 9, 1866, commonly known as the "Civil Rights Bill," and by the adoption of the fourteenth amendment to the Constitution of the United States. The plaintiffs in suit 653, object that the Civil Rights Bill is unconstitutional and that the fourteenth amendment was adopted after the marriage took place between E. C. Hart and Cornelia the mother of the children.

The first section of the Civil Rights Act declares "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the

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United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

The subsequent sections provide the means for enforcing the law in the several States and Territories, and denounces certain penalties for violating its provisions, and provides for final appeal to the Supreme Court of the United States.

This act of Congress only declares who shall be citizens of the United States, what shall be their rights and privileges in the several States, and provides penalties for a violation of those rights and privileges. This we think Congress had clearly the right to do, and we therefore see no reason to doubt the constitutionality of the act.

The sixth article of the constitution of the United States declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

If this law of Congress called the "Civil Rights Act" is not in violation of the constitution of the United States, it is paramount to any State law, and the provisions of any State law that are inconsistent with or conflict with it are to that extent annulled.

If Cornelia Hart and her children were once slaves, they became free persons under the State constitution of 1864, title 1, article 1:

"Slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are hereby forever abolished and prohibited throughout the State."

The constitution of 1864 made the appellee and her children free persons. The act of Congress of April, 1866, made them citizens of the United States, and relieved them of all previous disabilities they labored under on account of race, color or previous condition of slavery, by annulling previously existing laws of the State creating such disabilities, and conferred upon and vested in them all the civil rights and privileges of white persons. Cornelia Hart, therefore, in

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November, 1867, was vested with the right to enter into a contract of marriage. Our law considers marriage in no other view than as a civil contract. C. C. art. 86.

Article 90 of the Code proceeds: "As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties at the time of making them were, first, willing to contract; second, able to contract; third, did contract pursuant to the forms and solemnities presented by law."

All the conditions required by the laws of Louisiana to constitute a valid marriage we think were fulfilled in the marriage of E. C. Hart with Cornelia, the mother of his children. It is distinctly established by the testimony of the priest who performed the marriage ceremony that the marriage was not what is termed "a private marriage," as contended for by the appellants, such marriages not being permitted by the rules of the Catholic church. The objections to the validity of this marriage because no marriage license was issued, and that it was not published or made public, we consider as without weight. Article 149 of the present State constitution declares:

"All rights, actions, prosecutions, claims, contracts, and all laws in force at the time of the adoption of this constitution and not inconsistent therewith, shall continue as if it had not been adopted. All judgments and judicial sales, marriages and executed contracts, made in good faith and in accordance with existing laws in this State, rendered, made or entered into between the twenty-sixth day of January 1861, and the date when this constitution shall be adopted, are hereby declared to be valid, except the following laws," etc.

The marriage of these parties having been entered into within the period embraced by this article of the constitution of 1868, and having been celebrated in accordance with existing laws of this State, seems to have been ratified and confirmed, had there existed any doubt of its validity.

On the question of the legitimation of the children the appellants rely upon the articles 198 and 200 of the Civil Code. Article 198 provides that, "children born out of marriage, except those who are born from an incestuous or adulterous connection may be legitimated by the subsequent marriage of their father and mother whenever the latter have legally acknowledged them for their children either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself." Article 200 declares that "a natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children

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can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article when there exists on the part of such parent legitimate ascendants or descendants."

By the former laws of this State the children of E. C. Hart by the colored woman Cornelia could not have been legitimated for the reason that at the time of their conception, their parents could not have entered into marriage; but in the consideration of the subject we must bear in mind that at the time of the marriage of these parents in 1867, the incapacity in the children under the former laws of becoming legitimated on the ground of the legal inability of their parents to contract marriage at the time of the conception of the children, had been obliterated. No incapacity for that cause existed. The effect of the law of Congress was, to place them in the situation they would have been in under the former laws, if at the time of their conception their parents could have contracted marriage; in other words the effect of the law of Congress was to place them in every respect as to legal rights, in the situation of white children; and in this investigation we must throughout consider them as occupying the same position that white children occupy.

But we understand the appellants to hold that without regard to color children in this category can only be legitimated by the marriage of their parents and the acknowledgment of the parents made by an act passed before a notary and two witnesses. In this we apprehend they are in error. Other modes of acknowledgment seem clearly to be authorized by our laws. "The filiation of legitimate children may be proved by a transcript from the birth or baptism kept agreeably to law or the usages of the country." C. C. article 193.

An acknowledgment may be made by the contract of marriage. C. C. 198.

"Illegitimate children who have not been legally acknowledged may be allowed to prove their paternal descent. C. C. article 208.

The succeeding article of the Code declares: "In the case where the proof of paternal descent is authorized by the preceding article, the proof may be made in either of the following ways:

First—By all kinds of private writings in which the father may have acknowledged the bastard as his child, or may have called him so.

Second—When the father, either in public or private, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such.

Third—When the mother of the child was known as living in a state

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of concubinage with the father, and resided as such in his house at the time the child was conceived."

We consider it well settled that other modes of the acknowledgment of illegitimate children besides that by notarial act are authorized by the laws of this State. In the case of *Lange et al. v. Richoux et al.*, 6 L. R. 570, this court said, in reference to this subject, that "the words used in article 221 [203 of Ray's Code] are not prohibitive, and so far from declaring that a declaration before a notary shall be the only proof permitted, the Code expressly permits other modes of proof, both of paternal and maternal descent, without any restriction as to the purpose for which it may be allowed." The cases referred to by the counsel for appellants seem to relate to colored children under laws not now in force, and are not applicable to the case before us.

It remains to be considered whether the children of Cornelia Hart were capable of inheriting at the time of the opening of the succession of E. C. Hart in May, 1869. Article 950 of the Civil Code declares that it is "at the moment of the opening of the succession that the capacity or incapacity of the heir who presents himself to claim an intestate succession is considered." Article 945 provides that "all persons, even minors, lunatics, persons of insane mind, and the like, may transmit their estates *ab intestato* and inherit from others." Article 199 declares that "children legitimated by a subsequent marriage have the same rights as if they were born during marriage." Article 954 declares that "the child legitimated by a marriage posterior to its conception, only takes those successions which are opened since the marriage of the father and mother."

The marriage of E. C. Hart with Cornelia, the mother of the children, claiming for them the succession of their father, was a valid marriage. The record abounds with evidence of the recognition and acknowledgment of these children by E. C. Hart. His solicitude to transmit his property to them is shown to have been strong. The Catholic priest testifies that prior to his marriage with Cornelia, Hart desired him to take a conveyance of all his property in trust for his children. His avowed object in marrying their mother was to legitimate them. They were baptized in the church as the children of E. C. Hart and Cornelia Hart. The act was performed with his knowledge and at his instance. He requested a friend to be present and stand as godfather to them. A registry of the baptism was made in due form. He called the children his own, caused them to be educated as such, and as his children employed physicians to attend them in sickness. Upon the cross-examination of Cornelia, the mother, she testified that E. C. Hart, in 1857, made a will in which he acknowledged as his own her two children then born, and provided for them and herself, and that he

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destroyed the will after their marriage. The evidence fully establishes that the mother was well known as living in a state of concubinage with the father, and resided in his house at the time the children were conceived and born. No impediment would be in the way of white children becoming legitimated, standing in every respect under the same circumstances.

We conclude upon the whole, that the children of E. C. Hart were capable of inheriting from their father at the time of his decease; that they are his legal heirs, and entitled by law to his succession.

There are various bills of exceptions in the record, taken by the appellants, to the admission of evidence offered by the counsel for the tutrix, to establish the acknowledgment of her children by Hart. The testimony we think was admissible under the pleadings, and that the exceptions were not well taken.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

ON REHEARING.

LUDELING, C. J. We deem it unnecessary to pass upon the questions raised by the amended pleadings and by the bills of exceptions, inasmuch as we propose to decide the questions raised by said amended answers; and the facts necessary to present those issues are either proved or admitted to be true. The ends of justice will be subserved, therefore, by a termination of this protracted and fierce litigation.

The pleadings and facts of this case are substantially stated in the opinion of the court rendered on the tenth of February, 1873.

The important questions to be determined are:

First—What effect did the Civil Rights bill have upon the status of Cornelia Hart and her children, persons of color?

Second—Did the law of Louisiana in 1867 exclude or prohibit all other modes of acknowledgments for the purpose of the legitimation of children by a subsequent marriage except those made in notarial acts, in the registry of birth or baptism, or in the act of marriage?

Third—Did E. C. Hart and Cornelia Hart legally acknowledge their children before their marriage?

I. The effect of the Civil Rights bill was to strike with nullity all State laws discriminating against them on account of race or color, and to confer upon them the rights and privileges which they would have under the State laws if they were white persons. It invested her with the capacity to enter into the contract of marriage with E. C. Hart, a white man, and to legitimate her children by him born before said marriage, just as if she had been a white woman.

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The law declares they "shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Marriage is a civil contract. C. C. art. 91.

II. The Code of 1825, under which the rights of the parties must be determined, subject, of course, to the modifications made therein by the civil rights bill, passed in April, 1866, contains the following provisions: "Children born out of marriage, except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage or by their marriage contract itself."

It is contended that the natural children could not be legally acknowledged, except by a formal act, a solemn act, in which form is of the essence. We have searched the Code in vain to find anything to support this position when white children are concerned. The only article of the Civil Code relied upon is article 221. It provides that "the acknowledgment of an illegitimate child shall be made by a declaration, executed before a notary public, in presence of two witnesses, whenever it shall not have been made in the registering of the birth or baptism of such child. No other proof of acknowledgment shall be admitted in favor of children of color."

To say that this article is not prohibitive of other proofs of acknowledgment, except in favor of children of color, would be but a repetition of the language of the article. To maintain that the prohibition applied to white children, would be to render useless or meaningless an entire sentence in the article.

A statute is to be so construed as to give sense and meaning to every part, if possible. The maxims, "*expressio unius est exclusio alterius*," and "the exception proves the rule," are fully applicable to this article. Therefore, "other proof of acknowledgment shall be admitted in favor of" white children. And article 227 of the Code of 1825 declares some of the ways in which proof of acknowledgment may be made when not prohibited. It may not be amiss here to notice that in the Code of 1808, the article 25 of sec. 2, chap. iii, corresponding to article 221 of the Code of 1825, made no distinction between white and colored children as to the kind of proof required, while the Code of 1825, as we have already seen, made a marked distinction. And

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the Code of 1870, while obliterating all distinctions on account of race or color, made a material addition in article 119 (217) by incorporating in said article the words, "by an act passed before a notary and two witnesses," after the clause, "whenever the latter shall have legally acknowledged them," etc. But, of course, this change can not affect the rights of the children of Hart, which were fixed in 1867. C. C. art. 944.

The question presented in this case, it is believed, has never been directly adjudicated by this court. The case reported in 4 Mart. 266, was under the Code of 1808, and the parties to it were colored persons; and so they were in the following cases, in which the court expressed opinions in regard to the manner of proving an acknowledgment, to wit: 4 La. 175; 6 La. 560; 14 La. 542; 12 R. 57; 6 An. 157; 15 An. 342, and 21 An. 435. The views therein expressed are somewhat conflicting, and the cases preceding that in 6 An., *Dupré v. Caruthers*, were reviewed by Mr. Justice Preston, in whose conclusions alone a majority of the court concurred, while Mr. Justice Rost, dissenting, reviewed the law and the decisions of this court, as well as the jurisprudence of France upon the subject. He adhered to the opinions expressed in *Lange et al. v. Richoux et al.*, 6 La. 570, in which it was held that the language used in article 221 C. C. is not prohibitive, and that so far from saying that a declaration before a notary, or in the registry of birth or baptism, shall be the only proof permitted, the Code expressly permits other modes of proof, both of paternal and maternal descent, without any restriction as to the purpose for which it may be allowed. 6 An. 158. As to white children, we conclude that the interpretation of article 221, made in *Lange et al. v. Richoux et al.*, is correct. See also *Jones v. Hunter*, 6 Rob. 236, where it is held that an acknowledgment in a will made in Mississippi, not passed before a notary, was valid.

III. The evidence in the record leaves no doubt that E. C. Hart and Cornelia Hart openly, publicly and continuously, during many years, acknowledged their children. It is proved that Cornelia Hart was the concubine of E. C. Hart, and resided with him in his house from 185 until his death in 1869; that he publicly recognized them and treated them as his children, providing for their wants and education; that he requested a priest to baptize them, and asked a friend to stand as the godfather of his children. It is further proved that he was solicitous about disposing of his property so that it might enure to the benefit of his children after his death; that he requested Father Pierre, a Catholic priest, to take it for their benefit, who declined, but suggested that he could legitimate his children by marriage, and thereupon he married the mother of his children for the purpose of legitimating them,

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in order that they might inherit his property. This is the substance of the testimony of the priest. It is ample to establish the acknowledgment before the marriage. But there is abundant proof of their acknowledgment before the marriage besides the testimony of the priest.

It is contended that inasmuch as the law forbade the marriage between their parents at the time of their birth, the children never afterwards could be legitimated. This is manifestly a *non sequitur*. While that prohibition existed as a law of the State they could not be legitimated; but the moment after the law forbidding marriages between white and colored persons was abrogated, it was lawful to legitimate them in every way that white children might be. And the only prohibition against the legitimation of children by the marriage of their parents is to be found in article 217 of the Code of 1825, and the prohibition applies only to children born "from an incestuous or adulterous connection."

It is therefore ordered and adjudged that the decree heretofore rendered in this case be adhered to.

MORGAN, J., *dissenting*. From the year 1854 to the day of his death, which occurred in 1869, E. C. Hart lived in concubinage with the plaintiff in this suit. She was a colored woman, and his slave. By her he had several children. In November 1867, he married her. None of the children were born after the marriage. They were, I believe, all born while the mother was a slave. Subsequent to their marriage the children were baptized. They were baptised as the children of Hart. The testimony is conclusive that before and after the marriage Hart treated these children as his own; that he admitted them to be his; that he desired to legitimate them, and that the priest who performed the marriage ceremony between the plaintiff and himself, advised him that marriage would legitimate them.

Under this state of facts the first question to be disposed of, in my opinion, is, can children born from parents so situated be legitimated under the laws of Louisiana? I think not.

Article 217 of the Civil Code of 1825 declares that "children born out of marriage, except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage or by the contract of marriage itself. Every other mode of legitimating children is abolished." By the statute of twenty-fourth March, 1831, p. 86, so much of this article as abolished all other modes of legitimation,

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except by marriage, was repealed, and natural fathers and mothers were permitted to legitimate their natural children, by acts declaratory of their intention, made before a notary and two witnesses. It was, however, provided in the same act that nothing contained therein should be so construed as to enable a white parent to legitimate a colored child, nor to prevent a free person of color to legitimate his colored children. It was also provided that legitimation could only take place if the natural children were the issue of parents who might, at the time their children were conceived, have contracted marriage. By the same Code free persons, without reference to color, and slaves, and free white persons and free people of color, were incapable of contracting marriage together. C. C. 95. This was the law when Hart's children by the plaintiff were conceived, when he married her, and when he died. As they are the issue of parents who, at the time they were conceived, could not have contracted marriage, they can not, in my opinion, be legitimated.

It is held by the majority of the court that what is known as the Civil Rights bill obliterates all State laws creating distinctions between inhabitants of the State on account of race, color or previous condition, and therefore the marriage between Hart and the plaintiff was not prohibited by the State laws at the time of their marriage, and the marriage legitimates the children under the acknowledgments to be found in the record. I do not so read that law. I understand it to give to all citizens of the United States of every race and color without regard to any previous condition of slavery the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, etc., and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Marriage is, with us, a civil contract, inheritance is regulated by law. White persons and persons of color may by this act contract marriage; colored children may inherit. This proposition I do not dispute. But I deny that the act in question professes to regulate the legitimation of children, or that it provides how the fact of legitimation shall be established, or what acts constitute legitimation, or that it pretends to alter our laws upon the subject of inheritance. It simply does away with all distinctions on account of race, color or previous condition. The question of race or color does not in my opinion occur in the case. I treat the plaintiff and her children precisely as if they were white and free born. But I say that they are governed by the same laws that white persons are; and I say that as the law prohibited her marriage with Hart at the time their children were conceived, and as the law in existence when they were conceived declared that no child could be legitimated who was conceived when its parents could

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not contract marriage, the children of Hart and the plaintiff could not be legitimated.

The Civil Code declares between whom marriage is permitted, and between whom it is prohibited. It also declares what children shall and what children shall not be legitimate, and what children born out of wedlock may, and what children may not, be legitimated. These are questions which belong exclusively to our domestic life, with which Congress, in my opinion, did not seek to interfere when it passed the Civil Rights bill. It endeavored to, and it did, put every citizen upon a common footing as regards his civil rights, but it in no manner, that I can see, changed or attempted to change the laws of Louisiana with regard to the legitimation of children born of her citizens.

By our laws marriage between uncle and niece is prohibited. But this law might be repealed. Suppose that, with the law as it stands, an uncle has a child by his niece, and after the birth of the child the law prohibiting marriage between uncle and niece is repealed, and the father and mother of the child marry, acknowledging it in the act of marriage, is the child legitimated? I think not. By the amendment to the Code above recited (217) children conceived by a woman between whom and the father marriage was prohibited were placed in the same category with children born of an incestuous or adulterous connection. A child conceived in adultery is adulterous, although at its birth its parents were free to marry. Marriage with acknowledgment does not legitimate the child so conceived. See Sirey, Codes Annotés, art. 331, p. 169.

Admitting, however, that plaintiff's children could have been legitimated, a second question then arises. It is this: Have they been properly acknowledged? Acknowledgment, as I understand the law to legitimate a child, must be made in the form and manner prescribed by law, else it has no effect, just as certain formalities are required in the making of valid testaments, donations, etc.

Assume that Hart and the plaintiff were both white, and that when her children were conceived there was no impediment to her marriage with Hart, how, and how alone, could they have been legitimated? I think the question is answered by the terms of the law. They must have been legally acknowledged as their children, either before their marriage or by the contract of marriage itself. It is not pretended that the act of marriage contains the acknowledgment; and the act of twenty-fourth March, 1831, page 86, gives to natural fathers or mothers the power to legitimate their natural children by acts declaratory of their intention, made before a notary and two witnesses. There is no such act as this in the record. In my opinion, if the parties in interest in this case were whites, the article 217 of the Code and the act of

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twenty-fourth March, 1831, would prohibit their legitimation except under the forms therein prescribed.

The article 217 of the Code of 1825 is a reprint of the article 331 of the Code Napoleon, and the views which I have here expressed are sustained by Toulhier, vol. 2, p. 132; by Marcadé, vol. 2, p. 43; by Demolombe, vol. 5, p. 339, No. 362; by Duranton, vol. 3, p. 174; by the Court of Cassation, Rep. Gen'l, supplément, vol. 2, p. 337, *verbo* Legitimation; by the decision of Judge Martin in the case of Pigeau v. Duvernay, 4 Martin, 263.

The majority of the court seem to find authority for a contrary doctrine in the dissenting opinion of Mr. Justice Rost in the case of Dupré v. Caruthers, 6 An. p. 156. I have examined that case, and judge Rost's opinion with all the care which I can bestow upon it, and with all the attention which his acknowledged abilities command; I can not find in it any expression even which would, in my opinion, justify the conclusion that he thought children born out of wedlock could be legitimated in any other manner than those prescribed in article 217 of the Code of 1825, and the act of twenty-fourth March, 1831. The question was not before him. What he had to pass upon was not legitimation as the result of acknowledgment or marriage. The question was whether natural children could take by inheritance the property of a deceased parent if they had not been duly acknowledged, and it arose under arts. 913, 916 of the Code. In my opinion, the vice of the opinion of the majority of the court consists in this, that the article relied on by them to support their conclusions is found under the second section of the third chapter of the Code, and relates to the acknowledgment of illegitimate children; while the subject of legitimation is treated of in the first section of the same chapter. There is, I think, a wide distinction between legitimation and the acknowledgment of an illegitimate child. The laws which regulates their respective rights and duties are different. Every legitimate or legitimated child is an acknowledged child, but every acknowledged illegitimate child is not a legitimated child, for "illegitimate children, though duly acknowledged, can not claim the rights of legitimate children." This is the language of the 224th article of the Code which follows, in the same section, the article 221 relied on.

This case is of great importance, not so much on account of the interests involved, which are large, as on account of the principle which it settles. It has been twice before the court, and most ably argued, orally and by brief, by the counsel engaged on either side. It has been patiently and maturely considered by the court, and the result of our deliberations are now and finally given to the world. It is with regret that I find myself constrained to differ from my brothers. But

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the law and the authorities, as I read them, are plain before me, and I have nothing to choose from. I must go in the face of them all to agree with them, and this my duty forbids.

I know it seems hard that collateral kindred should be permitted to inherit in preference to the children of his body, no matter how begotten, and that such children should suffer from the result of a sin of which they were innocent, and which they could not prevent. But the law has put its ban upon them, white and black, and I have not the power to remove it. Hart knew when he was begetting these children what the consequences would be to them. If they suffer, it is from his fault, and not the laws, civil and moral, which he defied. Upon this subject I agree to what was said by Judge Preston in the case of Dupré:

“We know the object of the Legislature is, in the first place, to honor matrimony, which is of such incalculable importance to society; and, in the next place, to discourage concubinage, which is the cause of so much dissoluteness and evil. To prevent it the Legislature hold out the strongest motive, which can influence a parent—the legal disinherison of his offspring, unless he avows his shame before a notary public and witnesses, or in the face of the church. It is true,” continues this judge, “that legislation has ever failed in its object, for probably no one was ever deterred from concubinage by the consideration that his innocent offspring would be the victim of his guilt. And the only effect has been that the guilty parents have eaten the grapes, while the innocent children’s teeth, with tears in their eyes, have been set on edge. But still it is the law, and must be obeyed until it is repealed.”

I therefore dissent from the opinion expressed by the majority of the court.

WYLY, J., *dissenting*. I dissent in these cases, and reserve the right to file my reasons hereafter.

Master and Wardens of the Port of New Orleans v. Foster.

No. 4765.

MASTER AND WARDENS OF THE PORT OF NEW ORLEANS v. ROBERT W. FOSTER.

This suit is brought under the second section of act No. 68, session of 1869, p. 67, which provides that it shall be unlawful for any person other than the master and wardens of the port of New Orleans, or their legally constituted deputy, to make any survey of hatches of seagoing vessels coming into the port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates or orders for the sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for the master and wardens to do and perform.

The section above referred to is not unconstitutional. The Legislature may not have the power to force a vessel which comes to this port from sea to have a survey made of her hatches, but it has the right to designate by whom a survey shall be made, if one is asked for by the captain or owner of the vessel. This is not a tax upon commerce. It is only saying by what officer a certain act shall be performed.

When the law says it shall be unlawful for any person to do a particular thing, the party who attempts to do it may be enjoined by any person in interest.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Henry C. Dibble and Billings*, for plaintiffs and appellees. *E. S. Craig*, for defendant and appellant.

MORGAN, J. Petitioners seek to enjoin the defendant from making any survey of the hatches of any seagoing vessel which may have arrived or which may arrive at this port, and from making any survey either on board or on shore of any damaged goods which may have arrived or which may arrive on any seagoing vessel, and from giving any certificates of any survey and from doing any act which the master and wardens are authorized by law to perform.

The suit is brought under the second section of act No. 68, session 1869, p. 67, which provides that it shall be unlawful for any person other than the master and wardens of the port of New Orleans, or their legally constituted deputy, to make any survey of hatches of seagoing vessels coming into said port of New Orleans, or to make any survey of damaged goods coming on board such vessel, whether such survey be made on board or on shore, or to give certificates or orders for the sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for the master and wardens to do and perform.

Defendant admits that by reason of his superior experience in marine matters, he is often called upon by parties in interest to inspect damaged goods and vessels and to report upon them, but that he has never sought or claimed to give any legal effects to his acts; that no law can compel private citizens to employ the plaintiffs when all parties in interest do not wish their services; that the act of 1869, and all other acts giving compulsory and exclusive powers to masters and wardens to inspect vessels and make surveys, to his exclusion, or to

the exclusion of any one else, is unconstitutional and void, and repugnant to the constitution of the United States and to the constitution of the State of Louisiana.

From a judgment rendered against him he has appealed.

A case precisely similar to the one at bar, and between the same parties, was decided some time ago, and is to be found in 23 An. 750. In that case we said:

“The evidence shows that the defendants have entered into a contract whereby the said Foster was employed to examine and survey damaged goods in cases where they were interested, and that said Foster does not pretend to act under any commission or by virtue of any public office, but simply as the employé of the merchants and underwriters who may engage his services, and that he has not molested or interfered in any manner with plaintiffs.

“We know of no law which prevents the defendants from entering into such a contract as the above, and we think the plaintiffs have wholly failed to show any right of action.” —

But since this decision was rendered the Legislature passed the act under which the present action is brought. By it all persons except the plaintiffs are prohibited from doing the things the defendants claim they have the right to do. The question is, has the Legislature the power to say who alone shall be permitted to make any survey of hatches of seagoing vessels coming into the port of New Orleans?

In support of the negative of this position, the appellant relies upon the decision of the Supreme Court of the United States in the case of the *Steamship Company v. Port Wardens*, 6 Wallace p. 31. That was a suit wherein the port wardens sought to recover from the company five dollars. Their claim was founded on a section of the act of fifteenth March, 1855, which provides that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in this port. The court held that the act in question was a regulation of commerce; that it imposed a tax upon every ship entering this port; that the power to regulate commerce was given to Congress; that it was thus given with the obvious intent to place that commerce beyond interruption or embarrassment arising from conflicting or hostile State regulations, and that the act under which that suit was brought worked the very mischief against which the constitution intended to protect commerce among the States.

The first section of the act of sixth March, 1869, p. 67, provides that it shall be the duty of the master and wardens of the port of New Orleans, within twenty-four hours after the arrival and mooring at the

wharf or landing in the port of New Orleans of any seagoing vessel arriving with cargo, to go on board such vessel and offer their official services to make survey of the hatches of such vessel, and to perform the acts and services prescribed by law for them to perform. And in case such services so offered to such seagoing vessel shall be declined or refused, the said master and wardens shall be entitled to charge and collect from such vessel, her master and owners or consignees, the amount of three dollars for services so tendered.

Under the decision from 6 Wallace, just quoted, it would seem that this portion of the act of 1869 would be unconstitutional. Admitting this to be so, it does not follow that the whole act is unconstitutional, and we would only be called upon to pass upon the question when it is presented by some person who is proceeded against for a violation of its provisions, as, for instance, if the suit for three dollars were to be instituted against the captain of a vessel to whom the port wardens had tendered their services, and been refused. But the present defendant can not set up the unconstitutionality of this section, he not being proceeded against under it.

Is the second section of the act, which provides that it shall be unlawful for any person other than the master and wardens, or their legally constituted deputy, to make any survey of hatches of seagoing vessels coming into the port of New Orleans, or to make any survey of damaged goods coming on board such vessel, whether such survey be made on board or on shore, or to give certificates or orders for the sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for the master and wardens to do and perform, unconstitutional? We think not. The Legislature may not have the power to force a vessel which comes to this port from sea to have a survey made of her hatches, but it has the right to designate by whom a survey shall be made if one is asked for by the captain or owner of the vessel. This is not a tax upon commerce; it is only saying by what officer a certain act shall be performed. This we think the Legislature has a right to do. It has the right, and has exercised it, to appoint harbor masters, port wardens, inspectors of various products, and it has never been held that the exercise of this right has been a tax upon commerce, or that it is a violation of the constitution.

The last question presented is, whether the plaintiffs are authorized under the constitution and laws of the United States and of this State to injoin the defendants from making surveys of the hatches of vessels, or to make surveys of damaged goods coming on board of vessels. Defendant contends that it is, because it deprives him of a means of support. We do not think so. In the case of *Shepherd v. Pyson*, 14 An. p. 7, it was said: "There can be no doubt that an injunction is a

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proper remedy to prevent a person from doing an act which may be injurious to another, or which impairs a right claimed by that other. The occupation of a pilot for the port of New Orleans is lucrative, and is restricted by law to persons especially designated by the Governor of the State. It is therefore evident that the exercise of this business by a person not legally appointed, may be prejudicial to each and every one who is so appointed."

"A party may always claim the aid of the laws of his country to prevent a wrong, which, if inflicted, he could claim damages for. These laws would be lamentably defective if they could not prevent injuries as well as punish them." 5 N. S. 501.

In the case under consideration the master and wardens are appointed by the Governor. The occupation which they are authorized to perform is a lucrative one, and all persons are prohibited from exercising it except those who are appointed by the Governor. We think that when the law says it shall be unlawful for any person to do a particular thing, a person who attempts to do it may be enjoined by any person in interest.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Justice Wyly, being absent, took no part in this decision
Rehearing refused.

No. 3068.

ELIZA V. MAHOOD v. IDA T. TEALZA, Wife, et al.

A large lot of furniture having been sold by plaintiff to defendant, for which part payment has been made to a considerable amount, plaintiff sues for the balance due on the same or for the restoration of the property. Defendant, avowing her own infamy, maintains that she is not bound by a contract *contra bonos mores*, as it was to the knowledge of plaintiff that the furniture was bought for the purpose of keeping a house of prostitution. The defense can not be accepted. The knowledge of the plaintiff of the immoral use for which the furniture was purchased did not violate the contract.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Bentinck Egan*, for plaintiff and appellant. *A. Trudeau*, for defendant and appellee.

TALIAFERRO, J. The plaintiff in this case sold to the defendant on the sixth January, 1868, a lot of furniture at the price of \$5500, to be paid monthly, in sums of two hundred dollars each month, except for the last month for which one hundred dollars were to be paid. Twenty-eight promissory notes were furnished by the purchaser for these consecutive monthly payments. The contract was entered into before a notary public. It was stipulated by the parties that after full payment

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of all the notes the furniture was to become the property of the defendant. The plaintiff in her petition sets out that \$4000 of the price have been paid; that eight of the notes, making \$1500, are unpaid; that defendant refuses to pay them, and has sold and disposed of a portion of the furniture, and is endeavoring to make away with the remainder, to defeat the plaintiff's rights and to defraud her of all recourse for payment of the remainder due her on the contract. She prays judgment recognizing her as the owner of the furniture, and that she recover possession of the same, or that she have judgment for the amount of the eight unpaid notes with privilege upon the property.

The plaintiff caused the furniture to be sequestered, and subsequently released it by entering into bond and taking possession of it, the defendant having failed on her part to do so.

The answer is a general denial. The defendant admits having purchased certain furniture from the plaintiff, but avers that she was induced to do so by the fraudulent representations of the plaintiff in regard to the cost and value of the furniture, and that defendant was, through error on her part and fraud on the part of the plaintiff, induced to enter into the agreement to pay a price greatly exceeding the value of the property. But the defendant obviously places her defense mainly upon the ground of the alleged illegality of the contract growing out of its violation of morals and public order. She avers broadly and has made the averment good that both she and the plaintiff were at the time of the contract keepers and managers of public houses of prostitution; that the large lot of furniture purchased by defendant from plaintiff, was sold by the plaintiff and bought by the defendant with the express knowledge and purpose of both, that it was to be used in houses of that character. The defendant avowing her own infamy, invokes the maxim *ex turpi pacto nil oritur actio*.

Upon the ground that the contract was one *contra bonos mores* the court below set aside the sequestration and dismissed the suit. The plaintiff has appealed. The defendant, in her answer to the appeal, asks an amendment of the judgment by ordering that the property sequestered be restored to her, and reserving to her recourse on the sequestration bond.

In the case of *Hubbard v. Moore* 24 An. 591, the plaintiff sold furniture to the defendant, a keeper of a house of ill fame, with the knowledge that it was to be used in that house by the defendant. So in the case of *Sampson Brothers v. Kate Townsend*, 25 An. 78, the plaintiffs were aware of the destination of the furniture sold by them to the defendant, the keeper of a brothel. In these cases the court held that the knowledge of the plaintiffs of the immoral use for which the furniture was purchased did not vitiate the contracts.

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In the case now before us, we see no reason why the same principle should not hold. We must, therefore, rejecting the plea of *contra bonos mores*, examine this case on the merits, and determine it according to the law and evidence. The plaintiff, we think, has not clearly made out her allegation, that a large part of the furniture in question was clandestinely sold and disposed of by the defendant. The petition refers to an informal inventory of furniture made as appears by its date on the first of June, 1867, and contrasting with it the inventory made by the sheriff at the time of the seizure under writ of sequestration, the plaintiff aims to show a large deficit in the amount. We do not see that this is conclusive. The inventory of first June, 1867, annexed to the petition is not signed by any one, and upon its face simply recites that it is a list or inventory of "furniture in houses No. 30 Basin street." This, it is shown, is one of the two houses which it seems contained furniture purchased by defendant; but the evidence does not sufficiently identify it as the same purchased by the notarial act passed six months afterwards. In that act it is declared that "sale is made of all the furniture in houses 30 and 28 Basin street, the purchaser being aware of every article therein contained, dispenses with enumerating them in this act." It is clearly shown that, about the time the sequestration was taken out, the defendant was endeavoring to sell all the furniture which the plaintiff under the terms of the contract, claims to belong to her. Eight notes, amounting to \$1500, it is shown, remain unpaid. For this sum the plaintiff should have judgment with privilege as claimed.

There are two bills of exceptions in the record, taken by the plaintiff to the admission of evidence to show the immoral character of the contract. It becomes unnecessary under our view of the case to examine them.

It is therefore ordered that the judgment of the district court be annulled avoided and reversed. It is further ordered and decreed that the plaintiff have judgment against the defendant for fifteen hundred dollars; that her lien and privilege upon the property sequestered be recognized and enforced, and that the same be sold to pay the aforesaid sum, the defendant paying costs in both courts.

MORGAN, J., *dissenting*. Defendant had leased from the plaintiff a furnished house on Basin street. On the sixth January, 1868, she agreed to sell the furniture contained in the house to the defendant when she should have paid her therefor \$5500 for which sum she took notes payable monthly. The furniture remained in the possession of the defendant. Four thousand dollars of the agreed price have been paid; \$1500 remain due. This suit is instituted by plaintiff who

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prays to be declared the owner of the furniture referred to, and that she be put in possession thereof on her surrendering the unpaid notes; or, that defendant be condemned to pay her the sum of fifteen hundred dollars. She also asks for judgment against the defendant's husband. The furniture was also sequestered and a privilege thereon is claimed.

The defendant answers that the whole contract is *contra bonos mores*. She avers that when she rented the house from plaintiff, furnished, it was to plaintiff's knowledge, for the purpose of keeping a public house of prostitution, and that the furniture was purchased with the same view.

To establish these facts witnesses were offered by the defendant and their testimony was received by the court to which the plaintiff objected on the ground that it contradicted the written act between the parties. I fail to see wherein the contradiction lies, as nothing is mentioned in the act with reference to the purposes to which the furniture was to be put.

The evidence satisfies me that the allegations with reference to the purposes for which the house was rented and the furniture purchased from the plaintiff are true. She knew what business had been carried on in the house. She was in the habit of frequenting it. She went there at night, and in the morning would return and ask the inmates what amount of business had been done the night before. She gave a credit to the defendant with a grocer to enable her to purchase wine which was to be sold to persons who visited the house. The business of renting furnished houses for the purposes of prostitution seems to have been regularly followed by the plaintiff. The one in question is the third which she rents for such purposes.

Under these circumstances it is not necessary, I think, for us to consider whether the public act passed between the parties was a sale, pure and simple, or whether it contained a resolutive condition or a suspensive condition. This is not the case of a dealer in furniture, selling his goods to the first comer and claiming the unpaid price thereof from his purchaser, as were the cases of Hubbard and Sampson & Brothers. 23 An. 59; 24 An. 625. It is the case of a woman who rents a house and sells the contents thereof to another woman with the knowledge that it has been, and the avowed intention that it should continue to be, used as a public house of prostitution, the business of which was encouraged by her presence and assisted with her means. The law, I think, leaves such people where it finds them, and takes no interest in their disputes.

I think the judgment should be affirmed.

Mr. Justice Howell concurs in this opinion.

Rehearing refused.

Gertrudiz Bonella and Caballero et als. v. Charles Maduel, Testamentary Executor, et al.

No. 4658.

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GERTRUDIZ BONELLA AND CABALLERO et als. v. CHARLES MADUEL,
Testamentary Executor, et al.

In this instance the defendant offered in evidence the petition in the case entitled "Succession of Jose Maria Caballero," and the judgment of the Second District Court and of the Supreme Court, decreeing her to be the legitimate child of the deceased. The plaintiffs objected on the ground that they were not bound by the judgment, not being parties to the suit.

The objection was correctly overruled. It was not a judgment *inter partes*, but a judgment *in rem*, and is evidence of *the facts adjudicated against the world*.

The judge *a quo* properly rejected the testimony taken by commission of witnesses not named in the interrogatories or commission. The party called on to cross question witnesses when testimony is taken by commission, is entitled to be informed of the names of the witnesses in order to know how to shape his questions.

The court below was right in not granting a continuance on the ground of the rejection of the above mentioned testimony, the party offering it not having made due diligence to get the evidence.

The plea of *res judicata* must stand. It is well settled that a final judgment of a court of competent jurisdiction as to the *status* of a person, is *res judicata* as to all the world, and the force and effect of *res judicata* is to make black white, and the crooked straight."

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. J. Ad. Rozier, Charvet & Duplantier*, for plaintiffs and appellees. *Geo. L. Bright, Lea, Finney & Miller*, for defendants and appellants.

LUDELING, C. J. The plaintiffs, who are cousins of the deceased, Jose Maria Caballero, and residents of Spain, instituted this suit to annul and set aside a judgment of the Second District Court of the parish of Orleans, rendered on the twenty-ninth June, 1868, in the case entitled Succession of Jose Maria Caballero, on petition of Mrs. Maria Dolores Felicite Caballero, wife of Jose Maria Conté, by which the testament of the late Caballero was set aside, and his daughter, Maria Dolores Felicite Conté, was decreed to be legitimate and sole heir of his estate; to have the universal legatee under that will declared to be a person interposed for the benefit of a colored concubine of the deceased, and their natural child; to have the executor render an account, and finally to be declared the sole legal heirs of the deceased, and as such to be put in possession of the estate.

Mrs. Conté, among other defenses, filed the plea of *res judicata*. There was judgment in favor of the plaintiffs and the defendant, Conté, has appealed.

On the trial the defendant offered in evidence the petition in the suit already named, and the judgment of the Second District Court and of the Supreme Court thereon, decreeing her to be the legitimate child of Jose Maria Caballero. The plaintiff objected on the ground that they were not bound by the judgment, not being parties to the suit.

The evidence was received. The ruling was correct. In *Ennis v. Smith*, 14 Howard's Reports (p. 430), the court said: "The decree of the department of Grodno is an exemplified copy of that made on

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the seventh May, 1843, in the case of the heirs of Kosciusko, and contains the geneological chart of the descendants of the sisters of Kosciusko. It is not a judgment *inter partes*, but a foreign judgment *in rem*, and is evidence of the facts adjudicated against the world."

Another bill of exceptions was taken to the rejection of testimony, taken by commission, of witnesses not named in the interrogatories or commission. On crossing the interrogatories the defendant had objected to the taking of testimony of witnesses not named in the interrogatories, and he renewed the objection when the testimony was offered in evidence. We think the ruling correct. The party called on to cross question witnesses, when testimony is taken by commission, is entitled to be informed of the names of the witnesses, in order to know how to shape his questions. 12 R. 102.

Another bill of exceptions was taken to the refusal of the judge to grant a continuance of the case, after the refusal to receive the testimony of the witnesses whose testimony had attempted to be taken, under a commission and interrogatories, in which they were not named. The ruling was correct. The party had not used due diligence to get the evidence.

Other bills of exceptions were taken by the plaintiff to the reception of record evidence and other evidence to prove the legitimacy of the defendant, under the laws of Spain, etc., which had been admitted in evidence. We deem it unnecessary to examine them in detail, inasmuch as under our view of the law on the subject of this suit, our conclusions would be the same, whether that evidence were in or out of this record.

On the merits this case presents the same questions which this court decided in the case entitled Succession of Jose Maria Caballero, etc., before referred to in this opinion, and the evidence in the case is substantially the same in the two cases. A careful examination of the briefs and arguments of counsel has not enabled us to detect any error in our former opinions, even if the main question involved in this suit, the status of Mrs. Conté, were now an open question. But it is not.

It is well settled that a final judgment of a court of competent jurisdiction as to the status of a person, is *res judicata* as to all the world, and the force and effect of *res judicata* is "to make black white, and the crooked straight."

It is therefore ordered and adjudged, that the judgment of the lower court be reversed and annulled, and that there be judgment in favor of the defendant, Mrs. Conté, and rejecting the plaintiff's demands with costs of both courts.

Mr. Justice Wyly, being absent, took no part in this decision.

Rehearing refused.

Durac, Bazus, transferee, v. Widow Ferrari, Goulard, third opponent.

No. 4779.

D. DURAC, JEAN BAZUS, transferee, v. WIDOW J. B. FERRARI, LOUIS GOULARD, third opponent.

The subrogation relied on in this case by Goulard, the third opponent, was not effected in conformity with article 2160, R. C. C. This article is very explicit. The act of borrowing and the receipt must be executed in the presence of a notary and two witnesses. In this instance the receipt was given by the sheriff, and should have been rejected on the objection made by the plaintiff. It is not an authentic act by law, and is not in the form of receipt required by the above mentioned article of the Civil Code. The subrogation therefore attempted in favor of Goulard, the third opponent, is without legal effect against any one having adverse claims such as the plaintiff or his transferee has shown himself to possess.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. O. E. Schmidt*, for plaintiff and appellant. *Albert Voorhies*, for the third opponent, appellee.

HOWELL, J. In June, 1869, F. J. Robert sold to D. Durac and Widow J. B. Ferrari a lot of ground in New Orleans, part of the price being paid in cash, and two notes, secured by mortgage, given by the purchasers *in solido* for the balance, the lot being divided or partitioned in the act of sale between the said purchasers. At the maturity of the first note, Durac, being bound solidarily on it, paid it and issued executory process for the half thereof against the portion belonging to Mrs. Ferrari. Pending these proceedings the second note matured, and Robert, the vendor, issued executory process thereon against the property sold by him. On a rule taken by Mrs. Ferrari, the sheriff was ordered to sell the portion of each purchaser separately, and from the proceeds of each pay the half of the debt and costs. On the day before the sale one L. Goulard loaned to Mrs. Ferrari, by authentic act, the amount due by her in the executory proceedings of Robert, which he, Goulard, paid to the sheriff, and took the following receipt:

"Received of Louis Goulard, for Mrs. Widow Ferrari (by act of subrogation), the sum of \$1250, for one-half of the capital, interest and costs on the property of Mrs. Ferrari, as per writ of seizure and sale of F. J. Robert v. E. Duckerts, widow of J. B. Ferrari, et als., her said property being hereby released and the sale by sheriff withdrawn." Signed by the sheriff.

On the next day Durac paid his portion of the debt to the sheriff, who two days after paid the whole to Robert's counsel, taking the following receipt:

"François J. Robert v. Elizabeth Duckerts, widow of J. B. Ferrari, et. al.—Seventh District Court, No. 8943.—Received, New Orleans, March 4, 1872, from C. S. Sauvinet, civil sheriff, the sum of \$2252 68, amount of claim and interest in above entitled case." Signed by the attorney.

Durac, Bazus, transferee, v. Widow Ferrari, Goulard, third opponent.

Subsequently the property of Mrs. Ferrari was sold under the executory proceedings of Durac, and a similar process taken out by Goulard, who filed a third opposition in the former, claiming the proceeds by preference over Durac, by virtue of his above mentioned payment, with subrogation, and a judgment thereon contradictorily with Robert in the suit of the latter against Mrs. Ferrari and Durac.

In answer to this opposition, Durac denies the validity and effect of the alleged authentic act of subrogation, the judgment thereon and the executory process taken out by Goulard, and avers that the only subsisting debt and mortgage upon the property or proceeds in question are evidenced by the note paid by him as co-debtor *in solido*, to one-half of which he is entitled out of the said proceeds in preference to all others, the note held by Robert having been paid, and the debt and its accessory, the mortgage, extinguished before the alleged judgment of subrogation was asked or granted.

Goulard contends that Durac can not in this way attack the validity of his (Goulard's) mortgage rights, and invokes the authority of *Hoy v. Scott*, 22 An. 416, to support his position. All that was decided in that case, upon this point, is that Hoy could not contest the reality of the judgment set up against him in a *concursum*, or the validity of its consideration, because it was recorded prior to the origin of his debt. Such is not the case here. Durac's claim existed before Goulard acquired any rights whatever in the controversy. Their rights are really of the same origin.

The only question for our decision is whether or not Goulard is subrogated to the mortgage rights of F. J. Robert, which he claims was effected under clause No. 2 of art. 2160 R. C. C., to wit:

"When the debtor borrows a sum for the purpose of paying his debts, and intending to subrogate the lender in the rights of the creditor. To make this subrogation valid, it is necessary that that act of borrowing and the receipt be executed in presence of a notary and two witnesses; that in the act of borrowing it be declared that the sum was borrowed to make the payment, and that in the receipt it be declared that the payment has been made with the money furnished for that purpose by the new creditor. That subrogation takes place independently of the will of the creditor."

This article is very explicit that the receipt as well as the act of borrowing must be executed in the presence of a notary and two witnesses, and the receipt adduced by Goulard in this case not being in that form should have been rejected on the objection made by Durac. The receipt given by the sheriff and relied on by Goulard is not an authentic act by law, and is not the form of receipt made necessary by the above

Durac, Bazus, transferree, v. Widow Ferrari, Goulard, third opponent.

article of the Code. The subrogation, therefore, attempted in favor of Goulard is without legal effect against any one having adverse claims, as Durac or his transferree has.

It is therefore ordered that the judgment appealed from be reversed, and that the opposition of Louis Goulard be dismissed, and the right of J. Bazus, transferree of D. Durac, to be paid out of the proceeds of the property of Widow J. B. Ferrari, sold herein, be recognized. Costs in both courts to be paid by opponent and appellee.

Rehearing refused.

No. 4998.

STATE OF LOUISIANA ex rel. BENTON v. THE JUDGE OF THE SUPERIOR DISTRICT COURT, parish of Orleans.

26 116
52 1192
26 116
j115 1040

The judge *a quo* can not be compelled by *mandamus* to reduce the amount of the bond fixed by him to set aside a judicial sequestration. A judge may be compelled by *mandamus* to act, in a particular case, but having acted, his judgment can not be revised except on appeal. One can not be compelled to change one's judgment in a matter where one has the right to judge.

APPPLICATION for a writ of mandamus against the judge of the Superior District Court, parish of Orleans. *Hays & New* for relator. *John Ray*, for respondent.

LUDELING, C. J. The real object of these proceedings is to compel the judge *a quo* to reduce the amount of the bond fixed by him to set aside the judicial sequestration. This, we think, can not be done by mandamus. A judge may be compelled by mandamus to act, in a particular case, if he refuses—but having acted, his judgment can not be revised except on appeal. One can not be compelled by mandamus to change his judgment in a matter where he has the right to judge. The answer shows that the defendant has done nothing in regard to the sequestration, since the appeal from the order granting the sequestration and appointment of a receiver, even if the appeal was taken within the legal delay to have the effect of a suspensive appeal. The answer of the judge is satisfactory, and the prayer of the relator is rejected, with costs of the proceedings.

Dunlop & McCance v. Minor et al., Palmer, third opponent.

No. 4992.

**DUNLOP & McCANCE v. HENRY D. MINOR et al—EDWARD C. PALMER,
Third Opponent.**

The taxes of the years 1867 and 1868 became due at least by the first day of December of these years; they were assessed respectively in the same years—the taxes for 1867 in 1867—those for 1868 in 1868.

Under the revenue act, approved April 4, 1865, numbered 55, and entitled "An Act to provide for increasing the revenue of the State and raising means to pay the interest on the State debt," the lien and privilege for taxes dated from the first Monday of July of the year for which the taxes were assessed, and continued for two years. .

But the revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the continuance of the tax list to five years from the first of April of the year for which the taxes may be assessed. The last section of said act provides that it shall go into effect on the first day of January, 1869, and repeals, from and after its going into effect, all laws and parts of laws contrary to its provisions.

It was competent for the Legislature to lengthen the term of prescription in regard to tax liens. The act of 1868 is not understood by the court as repealing the 32d section of the act of 1865, but only as extending the duration of the lien.

The question of prescription must, in this case, be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription, and the other portion has passed under another and different term. According to this method, it is found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J. F. Duffell*, for plaintiffs and appellees. *Tissot, Nicholls & Pugh, W. W. King*, for Palmer, third opponent and appellant.

TALIAFERRO, J. Third opponent complains that the sheriff of the parish of Ascension refused to furnish him a deed of conveyance of a plantation purchased by him at sheriff's sale, made under an order of seizure and sale, on the ground that the Recorder's certificate of mortgages exhibited at the sale, showed that the State and parish taxes against the property for the years 1866, 1867 and 1868 were unpaid, and that the lien established by law in such cases was of higher grade, than the special mortgage under which the plantation was sold; the opponent in this case being subrogated to all the mortgage rights of the seizing creditor. The opponent contends that the lien alleged to exist is extinct by the prescription of two years, and no longer incumbers the property.

This is the only question presented in this case, whether the lien established by law against property to secure the payment of money due for taxes is, in the present case, lost by prescription. The court below decided that as to the taxes against the property in question for the year 1866, the lien is prescribed, but that it still subsists for the taxes of the years 1867 and 1868.

From this judgment the opponent appealed.

The law invoked by opponent as alone applicable in this case, seems to be the Revenue act, approved fourth of April, 1865, numbered 55,

and entitled "An act to provide for increasing the revenue of the State and raising means to pay the interest on the State debt." Acts of 1865, p. 146 et sequentes.

The 32d section of this act provides, "That the taxes assessed by law on the property of any person or corporation are hereby declared a lien and privilege on the real property of such person or corporation, to date from the first Monday of July of the year for which they may be assessed, any alienation thereof or incumbrance thereon notwithstanding, and shall exist in favor of the State and parish for the respective amount of taxes assessed for each for two years, and shall be paid by preference to all mortgages and other incumbrances."

By the 24th section of the same act it is provided, "That the assessors shall complete three fair copies of their assessment rolls on or before the first Monday of October in each and every year, and shall affix to each a certificate," etc.

The 25th section provides, "That the assessment rolls thus certified by affidavits shall, on or before the first Monday of October of each year be opened in the office of each assessor." Notice is then to be given for thirty days for corrections of the roll by any person aggrieved; the whole to be completed and the rolls to be delivered by the first of January, to the auditors and the collector. A failure to comply with these directions subjects the assessors to severe penalties by section 28 of the same statute. The court will presume that the assessors accomplished their task and made their returns within the time prescribed by law. 1 An. 210.

It results then, we conclude, that the taxes of the years 1867 and 1868, became due at least by the first of December, of these years—that the taxes of these years were assessed respectively in the same years, the taxes for 1867 in 1867, those for 1868 in 1868. The words of the statute are plain, that "the lien and privilege shall date from the first Monday of July of the year for which the taxes were assessed," etc. It is contended on the part of the opponent that the lien subsisting for the taxes of 1867, terminated on the first of July, 1869; that for the taxes of 1868 on the first of July, 1870. This would be true if the act of 1865 is alone applicable in this case. But in October, 1868, the Legislature, by the Revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the time of the continuance of the tax lien to five years from the first of April of the year for which they may be assessed." The question now arises, what effect had that act upon the previous one of 1865? The last section of the act of 1868 provides that it shall go into effect on the first of January, 1869, and repeals, from and after the time of its going into effect, all laws and parts of laws contrary to its provisions. It was

Dunlop & McCance v. Minor et al., Palmer, third opponent.

competent for the Legislature to lengthen the term of prescription in regard to liens for the security of the payment of taxes, and we do not understand the act of 1868 as repealing the 32d section of the act of 1865, but only as extending the time for which the tax lien should subsist from and after the going into effect of the act of 1868. The question of prescription, we apprehend must be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription and the other portion has passed under another and different term. According to this method it will be found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed. The sale of the Southwood plantation took place on the sixth of January 1872. In regard to the tax lien for the taxes of 1867, the time commenced to run from the first of July of that year—one year and six months had elapsed on the first of January, 1869, when the act of 1868 went into operation. To complete the prescription six months were required to run. The term of prescription being extended to five years, fifteen months the equivalent of six months were necessary under the act of 1868 to complete the prescription. It was completed, therefore on the first of April, 1870, near two years before the sale of the property. Tested by this rule, it will be seen that the lien for the taxes of 1868 was not prescribed at that time. We conclude that the judge *a quo* was in error in deciding that the lien subsisted at the time of the sale as well for the taxes of 1867 as for those of 1868.

It is therefore ordered and decreed that the judgment of the district court, so far as it decreed that the tax lien for the taxes of 1867 still subsisted against the Southwood plantation, "sold on the sixth" of January, 1872, under an order of court, be annulled and set aside, and in other respects, that it be confirmed, the appellee paying costs of appeal.

No. 4973.

STATE ex rel. S. D. DIXON, tutor, v. JUDGE OF THE FIFTH DISTRICT COURT, parish of Orleans.

26	119
48	907
26	119
50	441
26	119
52	497

A judgment signed in vacation is no judgment. Being no judgment, no appeal could be taken from it. Relator has the right to see that the judgment of which he complains be regularly signed.

APPPLICATION for a mandamus against the Judge of the Fifth District Court, parish of Orleans. *Forman*, for relator.

The judgment was rendered on the twenty-fifth of June. It was signed on the tenth of July.

State ex rel. Dixon, tutor, v. Judge of the Fifth District Court, parish of Orleans.

MORGAN, J. Relator, on the opening of the court in November, asked the judge to sign the judgment again, which he refused to do. This rule is taken upon him to show cause why he should not be ordered to do so. He has made no answer.

The judgment having been signed in vacation is, under the authority of *Hernandez v. James*, 25 An. 483, no judgment. Being no judgment, no appeal could be taken from it. Relator had the right to see that the judgment of which he complains should be regularly signed. The rule is made absolute.

No. 4993.

S. FERNANDEZ & Co. v. ELIAS MILLER.

The affidavit on which the writ of provisional seizure issued in this case is insufficient. It was made by a person not shown to be one of the parties, or their attorneys, or a party to the suit.

The affidavit authorized and prescribed by the law is one made by the party or his attorney. One made by any other person is not authorized by the law, and, as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Guidry*, Parish Judge of the parish of Terrebonne and acting judge of the Fifteenth Judicial District Court. *J. B. Robertson, Bush & Guion*, for plaintiffs and appellants. *Goode & Winder*, for defendant and appellee.

HOWELL, J. The plaintiffs instituted suit against the defendant on a rent note for \$2000, and caused the movables on the plantation rented to be provisionally seized. The defendant moved to dissolve the provisional seizure, with \$1000 damages, on the ground "that the order granting the writ was signed by the parish judge, when there was no affidavit by the plaintiff or his attorney showing that the district judge was absent from the parish."

The writ was set aside, and damages in the sum of \$1000 allowed, from which plaintiffs appealed. The affidavit on which the writ was granted was made by one R. R. Barrow, not shown to be one of the plaintiffs or their attorneys, or a party to the suit. The affidavit authorized and prescribed by the law is one made by the party or his attorney. C. P. 128; R. S. 2027. One made by any other person is not authorized by the law, and as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

But we think the damages allowed are excessive. The defect is technical and does not affect the right of the plaintiffs to or the necessity for the writ, while the evidence shows that a seizure of the same prop-

Fernandes v. Miller.

erty was made at the same time, or a very few days previously, on a writ in another suit, by another party, on a rent note due a year or two before and given under the same lease as the one in this suit. It is clear, then, that any damage that may have resulted to the defendant from the seizure of his property, affected by the lessor's privilege and pledge, would have been caused whether the writ in this case issued or not. All the damages he can properly claim from the plaintiffs, under the circumstances, is a reasonable fee of counsel for setting aside the writ, the expenses of which will have to be borne by the plaintiffs. We think a fee of \$100 is ample in this case for the services of counsel in having the writ set aside.

No objection having been made to the investigation on the demand for damages, it is too late now to urge any.

It is therefore ordered that the judgment for damages be reduced from \$1000 to \$100, and as thus amended the judgment appealed from be affirmed. Defendant and appellee to pay costs of appeal.

No. 4999.

STATE ex rel. RICHARD TAYLOR v. JUDGE OF THE SUPERIOR DISTRICT COURT, Parish of Orleans.

This court can only mandamus a district judge for the purpose of maintaining and enforcing its appellate jurisdiction.

APPPLICATION for a mandamus against the Judge of the Superior District Court, parish of Orleans. *William H. Hunt* for relator. *Judge Hawkins*, respondent, *in propria persona*.

TALIAFERRO, J. The relator prays that a writ of mandamus be issued by this court compelling the Judge of the Superior District Court to order the clerk of the court and the receiver by said court appointed, to forthwith pay over to relator the revenues, tolls and fruits received by them in virtue of the writ of sequestration issued in said court in the case of *The State v. Richard Taylor*, and under the orders of the said court.

On a rule to show cause the respondent sets up various grounds why the mandamus should not be issued. The second in order, and the one we deem having the greatest weight is, "that this court can only mandamus a district judge for the purpose of maintaining and enforcing its appellate jurisdiction; that the case presented by the petitioner for the mandamus in no way affects the appellate jurisdiction of this court, or interferes with it."

Considering this to be the proper view of this case, it is ordered that the rule be discharged at relator's cost.

State ex rel. Heirs of Gee v. The Parish Judge of Claiborne.

No. 4957.

STATE ex rel. HEIRS OF GEE v. THE PARISH JUDGE OF CLAIBORNE.

The question in this case is whether the judge *a quo* had the right to refuse a suspensive appeal.

This is not the case of a contest as to which of several applicants shall be appointed administrator of a succession, where the necessity of an administration is not questioned, and where the appointment under the law takes effect notwithstanding an appeal.

The question is whether there was any necessity for an administration at all. From a judgment deciding this against them, the heirs had a right to a suspensive appeal to this court.

APPPLICATION for a mandamus against the Parish Judge of the parish of Claiborne. *Egan & Hayes*, for relators.

MORGAN, J. Mrs. Gee died on the eleventh December, 1873. D. B. Harrison, public administrator for the parish of Claiborne, applied to the parish court to be appointed administrator. His application was made on the eleventh December, 1873. He represented to the court that Mrs. Gee had died without leaving any will, and that she had left no heirs, present or represented, in the State.

On the twentieth December, certain parties claiming to be the heirs of Mrs. Gee, opposed his application, and prayed to be put in possession of the succession, they proposing to accept the same purely and unconditionally.

Before their opposition was tried, the public administrator presented another petition to the parish court, alleging that his first application was inadvertently made, and praying to be put in possession of the estate at once. The order was granted. From this order, which is a judgment, the parties claiming to be heirs asked for a suspensive appeal, which was refused, whereupon they apply to us for a mandamus against the judge praying that he be ordered to grant the suspensive appeal.

They are entitled to it. This is not the case of a contest as to who of several applicants shall be appointed administrator of a succession, where the necessity of an administration is not questioned, and where the appointment under the law takes effect notwithstanding an appeal. The question is was there any necessity for an administration at all, and from the judgment deciding this question against them, the heirs had a right to a suspensive appeal to this court.

The rule is made absolute, and the mandamus is to be issued as prayed for.

Conery v. Cannon et al.

No. 3061.

EDWARD CONERY v. J. W. CANNON, et al.

In March, 1868, judgment was rendered in the United States District Court against the steamboat *Magenta*, Captain Leathers as principal, and against his sureties on a release bond. The plaintiff was one of the sureties. Leathers desired that an appeal be taken, and that plaintiff, Conery, should sign the appeal bond, but Conery was anxious to be released from said bond and from the appeal bond to be signed, and from all liability on the same. Whereupon, to induce said Conery to sign the appeal bond, the defendants gave the bond on which this suit was brought, and the condition of which was to hold Conery harmless from any and all liability on the two bonds, refund to him any sum he might be compelled to pay by reason of the release and of the appeal bonds, and cause the said bonds to be canceled and annulled within one year, and in default thereof to discharge the claim of the libellant in the suit in which appeal was taken.

Defendants plead want of consideration; but Conery may have thought that his interests would be best subserved, at the time and under the circumstances, by taking such a step as would then secure his recourse against the principal on the return bond upon which judgment was already rendered, and that the delay of an appeal would endanger such recourse and fix absolutely his individual liability. It is to protect him against such contingency and release him from all liability in the matter that the bond was given. It constitutes a valid consideration for an obligation.

The amended answer of the defendants shows that the judgment from which an appeal had been taken was reduced, and, after becoming final, was paid by plaintiff, Conery, who caused himself to be subrogated to the rights of the libellant. This does away with the plea of the defendants that the suit was premature, inasmuch as nothing had been paid by plaintiff at the time of the instituting of said suit. The defect was cured if it existed.

Under the stipulations of defendants' bond, plaintiff was not compelled, before he pursued them for the reimbursement of what he had paid, to exhaust all recourse against the principal on the release bond.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for plaintiff and appellee. *R. & H. Marr*, for defendants and appellants.

HOWELL, J. In March, 1868, a judgment was rendered in the United States District Court for twelve thousand dollars and costs against the steamboat *Magenta*, and against T. P. Leathers, as principal, and E. Conery, J. H. Carter and J. W. Reeve, as sureties on a release bond. From that judgment Leathers desired to take an appeal and desired that Conery should sign the bond for the same, but Conery was desirous of being released from said bond and from the appeal bond, to be signed, and from all liability on the same. Whereupon the defendants in this suit, who became sureties on the appeal bond, gave to Conery the bond on which this suit is brought. The condition of said bond is to hold Conery harmless from any and all liability on the two bonds above referred to, refund to him any sum he might be compelled to pay by reason of said bonds, and cause the same to be canceled and annulled within one year, and in default thereof to pay to him a sufficient sum to discharge the claim of the libellant in the suit to be appealed.

The defendants contend, first, that the obligation sued on was without a consideration because the consideration expressed in the petition and the bond sued on was that Conery would sign the appeal bond,

which there was no necessity that he should do, and the act of signing imposed no new nor greater obligation on him, being bound whether he signed or not; and they refer to 5 R. 60; 11 An. 113; 2 How. 240. These authorities, as well as others, hold that it is unnecessary for the appellant to sign the appeal bond, it being enough that it be signed by a sufficient surety. But in this case Conery wished to be released from his liability on the release bond on which he was surety, and on which judgment was rendered against him with his principal and cosureties, and it was to protect him from such liability that the bond, now in suit, was given to him by the defendants. They expressly bound themselves to hold him (in the language of the bond) "harmless from any and all liability on said bonds, and to refund to him any sum of money he may be compelled to pay by reason of said bonds, and cause said bonds to be canceled within one year from the date hereof, and in default thereof shall pay into his hands a sum of money sufficient to pay and satisfy any and all claims of the said libellant, at the end of one year from date hereof." This refers to the release and appeal bonds.

Conery may have thought that his interests would best be subserved at the time and under the circumstances, by taking such a course as would then secure his recourse against the principal on the release bond, upon which judgment was already rendered, and that the delay of an appeal would endanger such recourse and fix absolutely his individual liability. It was to protect him against such contingency and release him from all liability in the matter that this bond was given, and which, in our opinion, constitutes a valid consideration for an obligation.

The defendants next contend that plaintiff has not put them in default and had not, at the institution of this suit, been compelled to pay anything, and hence had no cause of action.

Even supposing the suit may have been premature, as urged, the amended answer of the defendants shows that the judgment, from which an appeal had been taken in the libel suit, was reduced, and after becoming final was paid by plaintiff, Conery, who caused himself to be subrogated to the rights of the libellant.

This, by their own showing, put him in a position to demand of them the obligation of their bond to refund to him the amount so paid. Under the stipulations of said bond he was not compelled to exhaust all recourse against the principal on the release bond, before he could pursue them. Upon the record before us they are properly held to a performance of the obligations of their bond in favor of plaintiff.

Judgment affirmed.

Rehearing refused.

State of Louisiana v. Ranson, Tax Collector, and his securities.

No. 4988.

STATE OF LOUISIANA v. LOUIS RANSON, Tax Collector, and his securities.

Certain blank licenses signed by the State Auditor, which were part of those delivered by him to the defendant, a tax collector, and for which the collector stood charged in the Auditor's books, were offered in evidence to show that neither said Ranson nor his sureties could be liable to pay for said licenses. The court *a qua* properly refused to admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

The prescription of two years pleaded in defense in this case applies to acts of omission and commission, misfeasance, nonfeasance etc., of the sheriff, as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. The defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J. Morris Marks*, District Attorney, for the State, plaintiff and appellee. *James D. Augustin, Julien Michel* and *N. St. Martin*, for defendants and appellants.

TALIAFERRO, J. This is a suit brought in the name of the State against a former sheriff of the parish of St. Charles, and his three sureties, on a bond for the collection of the taxes of that parish for the year 1867. Judgment was rendered against the sheriff for the sum of \$8194 with legal interest from judicial demand; against two of the sureties for \$3000 each with like interest, and against the other surety for \$4000 with like interest from judicial demand.

The sheriff and Gassen, one of the sureties, have appealed. There are three bills of exceptions found in the record. The first relates to the fixing of the case by the district judge with preference on the day succeeding the one on which the case had been set for trial, but not reached that day. The judge subjoins to the bill of exceptions that no rule of that court prevented his action in the premises. No injury or inconvenience whatever is shown to have resulted to the defendants from the setting of the case for trial the next day. We think the objection was properly overruled.

The second bill of exceptions was taken to the admission in evidence of a certified copy from the recorder's office of the tax bond sued upon, it being objected to on the ground that Mallard, one of the sureties, had denied ever having affixed his mark to the bond as shown by the copy offered in evidence. As Mallard has not appealed, and the exception is personal to him, it is not necessary to pass upon this bill. The third bill of exceptions was taken to the refusal of the judge to receive in evidence certain blank licenses signed by the State Auditor, and which were part of those delivered to him by the Auditor, and for which he stood charged on his books. The court properly refused to

State of Louisiana v Ranson, Tax Collector, and his securities.

admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

The prescription of two years plead in defense in this case applies to acts of omission and commission, misfeasance, nonfeasance, etc., of the sheriff as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. Defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes.

We find no merit in the defense. It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 4978.

MRS. P. BOE v. E. FILLEUL, Testamentary Executor.

Oral evidence was properly admitted to show the relationship of two witnesses and of plaintiff to her deceased uncle, whose will she wishes to be declared null and inoperative, and the disappearance of plaintiff's father and his age.

Under this proof the presumption arises that plaintiff's father is alive; and there being no proof of his death, the plaintiff can not represent him, nor accept and claim through him the succession of her deceased uncle. She is therefore without capacity or interest to attack the will of the deceased.

A PPEAL from the Parish Court, parish of St. Charles. *Durapau, J. E. Bermudez*, for plaintiff and appellant. *Brieugne*, for defendant and appellee. *O. F. Olaiborne*, for absent heirs.

HOWELL, J. The plaintiff seeks to be appointed administratrix of her uncle's estate. Subsequent to her application a document purporting to be the last will of the deceased, having been probated and ordered to be executed, she asks that it be declared inoperative and null, and that she be appointed administratrix and entitled to one-fourth of the succession, as sole issue and representative of her father, on the grounds:

First—Because the universal legatees died before the testator.

Second—Because the particular legacy of the sum of \$——— is a nullity.

Third—Because the testamentary dispositions having lapsed, and there being no debts of the deceased, the appointment of an executor became inoperative.

The defendant, who is the executor, excepted to plaintiff's petition on the ground, among others, that the plaintiff is without capacity and without interest to attack the will. She is neither a legal nor

Boe v. Fillenl, testamentary executor.

testamentary heir of the deceased, called to his inheritance by the happening of his death.

On the trial of the exceptions, oral evidence was properly admitted to show the relationship of two witnesses and plaintiff to the deceased and the disappearance of the father of the plaintiff for many years, and his age. Under this proof the presumption arises that plaintiff's father is alive, and there being no proof of his death the plaintiff can not represent him nor accept or claim through him the succession of her deceased uncle. R. C. C. 70, 76, 899, 978, 979, 905, 390, 120, 476.

She is therefore without capacity or interest to attack the will of the deceased.

Judgment affirmed.

Rehearing refused.

No. 4602.

STATE OF LOUISIANA ex rel. E. MERLE v. A. DUBUCLET, Treasurer,
STATE ex rel. JOHN CHAPUS v. THE SAME—Consolidated.

The objection that this is a suit against the State, for the instituting of which permission has not been obtained from the Legislature, is not well founded. It is a mere application to a court of competent jurisdiction asking for a writ of mandamus against an officer of the State, commanding him to perform one of the duties of his office, to wit: to pay the sums which the Auditor, in conformity to law, has ordered him to pay.

The warrants held by the relator are sufficiently described. Their number, date, amount, and in whose favor they were issued, are specifically set forth, and the petition alleges that they are judicial warrants. The list containing these details was offered in evidence and received without objection, and there is no charge that they are spurious, and that the signatures thereto are not genuine.

No law has been exhibited which requires the Treasurer to give preference of payment to warrants of older date and lowest number, nor has it been shown that such has been the practice in the Treasurer's office. On the contrary, it has been the reverse.

It has been shown to this court that, while its doors remained hermetically closed against certain *bona fide* creditors of the State, it lay all unlocked to the occasions of others, who had no right of precedence over their competitors. All men are equal before the law, and all men, having equal claims upon the State for the payment of a common debt, have equal rights upon the common treasury.

A mandamus can properly issue against the Treasurer only when he has money, and illegally withholds it from one entitled to be paid. If he refuses to pay one creditor of the State and gives an illegal preference to another and pays to him all the money in his hands, he may make himself amenable to the law, which fixes his duty and imposes heavy penalties for the dereliction of that duty, but it is not a proper case for a mandamus.

To order the Treasurer in this proceeding, and under the circumstances of the case, to pay whenever the treasury may be replenished, is equivalent to a judgment on an ordinary proceeding, and would give in effect a preference to the relator, or is tantamount to an order in advance to the Treasurer to do what he has not refused to do, and what it must be presumed he will do, until the contrary be shown, as the presumptive evidence is in favor of an officer doing his duty.

A PPEAL from the Superior District Court, parish of Orleans.
A. Hawkins, J. A. & W. Voorhies, for plaintiffs and appellants. **A. P. Field**, Attorney General, for defendant and appellee.

MORGAN, J. Petitioner avers that he is the holder of certain judi-

State ex rel. Merle v. Dubuclet, Treasurer—State ex rel. Chapus v. The Same.

cial warrants, amounting to \$12,501 99, issued by the Auditor of Public Accounts, in payment of salaries of certain district and parish judges and district attorneys; that at various times he has presented these warrants to the State Treasurer for payment out of the general fund, appropriated for that purpose, but that the Treasurer has declined to pay them, averring that there are no funds which he can dispose of for that purpose, he being restrained from so doing by decrees of court rendered between other parties. He avers that there are funds in the treasury sufficient to pay his warrants, and that if the funds have been otherwise disposed of, they have been illegally and improperly disposed of. He avers that the same combination by which his rights have been baffled will continue to defeat him unless the courts afford him a remedy, and he prays for a mandamus against the Treasurer commanding him to pay his warrants out of any funds in the treasury, appropriated for that purpose.

Henry N. Benjamin intervened in this proceeding, before the treasurer had filed his answer. He avers that he is the holder of warrants amounting to about \$45,000, issued by the Auditor in payment of the salaries of constitutional officers. He avers that an injunction issued in suit No. 7847 of the docket of the Eighth District Court, entitled Henry N. Benjamin v. Antoine Dubuclet, Treasurer, whereby the said Treasurer was enjoined and prohibited from paying any warrants out of the general fund, until those held by him should be paid and satisfied. He prays that Merle's demand may be rejected, and that the Treasurer be directed to obey and respect the injunction issued in said suit.

The Treasurer answers that if he has moneys to the credit of the general fund, they have been used in payment of warrants of equal rank with relators, which he was bound to do by reason of the injunction in the case of Benjamin, and that the amount of said injunction has not been paid.

Merle's rule was fixed for trial on the eleventh October. The Treasurer's answer was filed on the twenty-third October.

There are other intervenors in the suit, but their rights do not seem to have been passed upon, and they have not complained of the judgment. It is not, therefore, necessary that we should notice them.

On the ninth January, 1873, the Treasurer, through counsel and the Attorney General, filed a supplemental answer, and, in reply to the petition of relator, and for reason why his demands should not be rejected says:

First—That this is a suit against the State, which can not be instituted without permission of the Legislature, and that this permission has not been obtained.

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Second—That he can not plead with certainty, because the relator has not described the warrants which he pretends to hold with such certainty as would enable him to plead; that he has not given number, date, amount, to whose order, by whom indorsed, on what fund drawn, nor for what consideration they were drawn; all of which particulars it is necessary should be set forth; to enable him to plead with certainty or with safety.

Third—That by law, and by the advice of the Attorney General, he is to give precedence to warrants of oldest date and lowest number; that there are large amounts of warrants outstanding of older date and smaller number than any held or claimed to be held by relator, and more than enough to absorb the entire funds of the treasury.

Fourth—That there are injunctions issued by the Eighth District Court, now forming part of the records of this (Superior) Court, in the suits of A. Bonita v. The State Treasurer, and H. N. Benjamin v. The State Treasurer, enjoining him from paying any warrants out of the general fund to any person until the warrants claimed in those suits shall first have been paid; that said injunctions were issued and granted after a due trial, and are, so far as the Treasurer is concerned, final.

First—This is not a suit against the State. It is a mere application to a court of competent jurisdiction, asking for a writ of mandamus against an officer of the State, commanding him to perform one of the duties of his office, i. e., to pay the sums which the Auditor, in conformity with law, has ordered him to pay.

Second—The warrants held by the relator are sufficiently described. Their number, date, amount, and in whose favor they were issued, are specifically set forth, and the petition alleges that they are judicial warrants. The list containing these details was offered in evidence and received without objection, and there is no charge that they are spurious, or that the signatures thereto are not genuine.

Third—We have not been referred to any law which requires the Treasurer to give preference of payment to warrants of oldest date and lowest number, nor do we know of the existence of such a law. Neither has the Treasurer shown that such has been the practice of his office. On the contrary, it has been the reverse. In the list of warrants paid by him, and furnished by him in evidence, in the Benjamin injunction, it is rare that the numbers follow each other, even approximately, and in many instances they are far apart. For example: The lowest number of the warrant he paid on the third October, was No. 2319; the highest, 2772. On the eighth, the lowest number was No. 56; the highest 3734. On the ninth, the lowest number was No. 111; the highest 3006, and so on.

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Fourth—There is no evidence in the record of any injunction against the Treasurer, which would, or could have prevented him from paying the relator's claim if there was money to pay with. He alleges in his answer that he has been enjoined from doing so by process issued in the cases of Bonita and Benjamin.

So far as the Bonita case is concerned, there is no proof of there being any such proceeding before us.

As to the Benjamin injunction, it appears that one did issue as alleged, in suit No. 7792, but the amount claimed in that suit was \$3930, and the judgment in this case is the only one in the record which compels him to pay Benjamin anything, or which gives him any preference. It would appear, however, that there is another suit of the same nature against the treasurer, also instituted by Benjamin, under the No. 7847, in which he claims \$45,000, but this record is not in evidence. Admitting it to be what the intervention claims it is, still it can not be successfully opposed to the present relator. The evidence shows that, as audited by the Auditor, \$78,348 72 were received by the treasurer, between the twenty-fifth September and the fifteenth October. If, therefore, he had paid the whole amount claimed by Benjamin in both of his suits, there would still have remained some \$30,000, out of which the relator's claim could have been paid. But the testimony shows that all of Benjamin's warrants, or those referred to in his petition, at least, have not been paid. Auguste, who collected them, says he had been paid about \$40,000; this would have left over \$38,000 in the treasury. Neither can the treasurer say that he kept the money in the treasury, for the evidence shows that while he received \$78,348 72, he paid out \$75,986. He must, therefore, have paid to others besides Benjamin. Benjamin's injunctions seem to have been used as a shield by the treasurer, to protect him against the payment of Merle's warrants, but they were no obstacle to his paying others. That he did pay others, while refusing to pay Merle, is apparent. Auguste testifies that he had collected \$40,000, leaving \$17,000 still to be collected. As Benjamin never claimed more than \$50,000, it follows that he must have been collecting for some one else. Indeed, he testifies that he was. He says, "On the second October, I made a demand for a settlement for Newman." Merle said, "I have a warrant for \$625, that I want to be paid." "I told him that I *collected under the injunction of Benjamin*, and had a right to be paid."

This evidence is more than substantiated by the fact that a comparison of the warrants described in the list attached to the first injunction with the list of those paid by the treasurer, shows that none of the warrants first described appear on the list furnished by the treasurer. We therefore believe that when Auguste testifies that when col-

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lecting under the Benjamin injunction, he was collecting Newman's warrants, he swore to the truth.

The record discloses the fact that the treasurer, although he filed an answer to the suits brought against him by Benjamin, neither appealed from the judgments when they were rendered against him, nor asked for an appeal, nor applied to the Attorney General to take one, nor did any thing to prevent their execution, although, practically, they effectually bolted and barred the treasury against the claims of every citizen who was a creditor of the State, except those in whose favor they were rendered and others who were allowed to profit by them.

An application for an appeal was made, but not by the treasurer. Bonis applied for one, alleging that he was the owner of warrants which the treasurer would not pay on account of these injunctions, but his application was refused by the judge, who considered that no appeal would lie from an order granting an injunction. But this was not an effort to appeal from an injunction *pendente lite*. It was an appeal asked from a judgment perpetuating an injunction, and commanding the payment of money, and from such a judgment it is clear that an appeal does lie.

A thorough and careful examination of the record has reluctantly forced the conclusion upon us that, in so far as relates to the present appearers, the business of the treasury department has been conducted in the interest of certain favored individuals, who, acting upon proceedings having the color of law, have managed it in their own interest; that while its doors remained hermetically closed against certain *bona fide* creditors of the State, it lay all unlocked to the occasions of others, who had no right of precedence over their competitors. All men are equal before the law, and all men, having equal claims upon the State for the payment of a common debt, have equal rights upon the common treasury.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be reversed; and it is further ordered, adjudged and decreed, that a writ of mandamus issue directed to the State Treasurer, Antoine Dubuclet, commanding him to pay the warrants annexed to the relator's petition, out of any funds in the treasury appropriated for that purpose, without any reference to any injunctions to the contrary which may have been issued to him.

JOHN CHAPUS v. ANTOINE DUBUCLET, State Treasurer.

MORGAN, J. This case is similar to the one just decided in the case of Merle v. Dubuclet.

For the reasons therein given, it is ordered, adjudged and decreed that the judgment of the lower court be reversed; and it is further or-

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dered, adjudged and decreed, that a writ of mandamus issue directed to the State Treasurer, Antoine Dubuclet, commanding him to pay the warrants annexed to the relator's petition, out of any funds in the treasury appropriated for that purpose, without any reference to any injunctions to the contrary which may have been issued to him.

ON REHEARING.

HOWELL, J. A rehearing was granted in this case "for the purpose of explaining the decree," which is in the following words: "It is ordered, adjudged and decreed that the judgment appealed from be reversed, and it is further ordered, adjudged and decreed that a writ of mandamus issue, directed to the State Treasurer, Antoine Dubuclet, commanding him to pay the warrants annexed to the relator's petition out of any funds in the treasury appropriated for that purpose, without reference to any injunctions to the contrary which may have been issued to him."

It is contended on behalf of the treasurer that this decree "compels him to pay the warrants annexed to the petition by preference over all other warrants, when there was no money in the treasury at the time they are presented out of which they could be paid," which is a contingency in which a mandamus should not be granted, whatever may be the personal responsibility of the treasurer for his acts. The facts in this connection, as we find them, are that when the relator presented his warrants there was money in the treasury, but the treasurer paid it out by preference to one Benjamin, or his agent, in obedience, as he asserted, to an injunction from the Eighth District Court for the parish of Orleans. We come to the conclusion, and we are still of the opinion that the said injunction was and is wholly without any legal effect, and did not justify the treasurer in his action in the premises. But we erred in ordering a writ of mandamus to issue when there was no money. Said writ properly issues against the treasurer only when he has money and illegally withholds it from one entitled to be paid. If he refuses to pay one creditor of the State and gives an illegal preference to and pays all the money in his hands to another, he may make himself amenable to the law, which fixes his duty and imposes heavy penalties for dereliction of that duty; but it is not a proper case for a mandamus.

To now order the treasurer in this proceeding to pay, under such circumstances, whenever the treasury may be replenished, is equivalent to a judgment in an ordinary proceeding, and would in effect give a preference to the relator, or to an order in advance to do what he has not refused to do, and what it must be presumed he will do, until

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the contrary be shown, as the presumption is in favor of an officer doing his duty. We may very well say, that the injunction invoked is no legal protection or excuse, but the claim secured by that injunction can not always exist. Indeed the record shows that it was paid or nearly so at the time of the trial of this case in the lower court.

While our opinion of the acts of the treasurer in this whole matter are unchanged, still we are not ourselves authorized under the facts and the law to make the mandamus peremptory. Instead of simply explaining, we must reverse our former decree.

It is therefore ordered that our decree herein be set aside, and that the judgment of the lower court be affirmed.

STATE ex rel. JOHN CHAPUS v. ANTOINE DUBUCLET, State Treasurer.

HOWELL, J. For the reasons just given in the case of the State ex rel. E. Merle v. Antoine Dubuclet, State Treasurer, it is ordered that the decree heretofore rendered by us be set aside, and that the judgment appealed from be affirmed.

MORGAN, J., *dissenting*. The treasurer complains of the judgment pronounced by us in this case, in this, that "it compels the treasurer to pay the warrants annexed to the petition by preference over all other warrants, when there was no money in the treasury at the time they were presented out of which they could be paid." I do not see how the decree can be so interpreted. Merle, the holder of a number of warrants payable out of a certain fund, was asking for their payment. The treasurer refused payment on the ground that he was forced to apply all the money coming into that fund first to the payment of warrants drawn against it, in the hands of one Benjamin, by reason of an injunction to that effect. We simply declared that Benjamin had no greater rights than Merle. The decree is that the treasurer pay the relator's warrants out of any funds in the treasury appropriated for that purpose, without any reference to any injunction to the contrary which may have been issued to him. The decree, I think, meant that Merle had the same right to be paid out of the fund in question that Benjamin had, and I do not see how it can be tortured into the construction that he should be paid "by preference over all other warrants."

Neither is the statement in the application for a rehearing that "at the time they were presented there was no money in the treasury out of which they could have been paid," correct. The contrary is the fact, and it is of this which Merle complains, and it is this which we thought he was entitled to complain of. The record shows that while he was being refused payment, upwards of seventy thousand dollars came

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into the fund upon which his warrants were drawn, while the injunction in favor of Benjamin, which the treasurer pleaded as a reason for not paying him, only held a little more than half of that sum. The record also shows that Newman's warrants were paid under Benjamin's injunction. These facts forced upon us the conviction, at the time the case was argued, that the treasury was being used in the interest of certain favored parties. I am of that opinion still. We thought then that the treasurer had no right thus to administer the trust reposed in him. I still think so. We thought then that we could force the treasurer to perform his duty, and upon this point my mind remains unchanged. We thought then that he had shown a preference where he should have been impartial. I think so still. We ordered him simply to do his duty, that is, to pay the warrants held by Merle precisely as he paid the warrants held by Benjamin and others having the same right against the same fund, and I think still that he should be held to it.

Neither do I think that the reason urged for a rehearing, that if Merle's warrants are paid "they will have to be paid out of money which has since come into the treasury," a good one. Of course if the treasurer has paid what money there was belonging to a certain fund, he can not pay the same money over. But he can pay when the fund is replenished, and all he was ordered to do was to pay out such funds as he had to those who were equally entitled to it, and not to give it to favorites, or use for excuse an injunction which did not cover the case.

Entertaining these views, I do not think the decree herein pronounced needs any farther explanation.

No. 4622.

THE STATE OF LOUISIANA v. DIDIO BAPTISTE AND FRANCIS MARTINI.

The judge *a quo* was right when he refused a continuance in order that the prisoners might obtain testimony from Europe to establish the fact that the man alleged to have been murdered was the nephew of one of the accused. The relationship of the parties has nothing to do with the guilt or innocence of the accused.

The judge did not err when he ordered that the witnesses for the State and the prisoners be separated, except the physicians. Dr. Jackson, being the coroner, was called to testify as such; Dr. Bemis and Dr. Beard, being required as medical experts as to the cause of death were permitted to remain to hear the evidence in order that they might form an opinion as to the cause of death.

The court *a quo* did not err in permitting Ward to testify as a witness. The objection was that he had been found guilty of two crimes, and had been sentenced to the penitentiary and to the parish prison; that he had been pardoned after his sentence had been completed; and that his pardon was not sufficiently proved.

State of Louisiana v. Baptiste and Martini.

It matters not whether the pardon came before or after the term of confinement had expired. There are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. The doctrine well recognized on this subject is, that a pardon gives to the person to whom it is granted a new character, and makes of him a new man. When extended to him in prison, it releases him and removes his disabilities; when given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities.

A communication from the Secretary of the Senate to the Acting Governor, informing him that his recommendation for pardon had been received, and that it had been acted upon favorably, is sufficient evidence of the completeness of the pardon.

The judge *a quo* did not err in permitting the physicians, as professional experts, to recapitulate to the jury the evidence they had heard, and which constituted the reason and foundation for their opinions in relation to the mode of death of the deceased.

The objection that they were physicians in the employ of two insurance offices which had each a policy in the life of the deceased, may go to their credibility, but does not make improper their answers to the questions propounded.

The jury, after being two days and two nights deliberating on their verdict, came into court, and through their foreman asked the court for further instructions as to the weight to be given to circumstantial evidence; and the court having briefly charged the jury that they were bound to act on circumstantial evidence as much as on any other evidence, and being about to send back the jury to their room for further deliberations, the counsel for defendants asked the court to give the jury a more explicit charge as to the character of the circumstantial evidence which was entitled to consideration by them. The court interrupted the counsel, and absolutely refused to hear what he had to say, or even to permit him to address the court upon the right of asking for additional charges on the particular information wanted by the jury.

On this point, it is obvious that the judge *a quo* erred, and that he refused to the prisoners a most important, and, in this instance, vital right.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. P. Field*, Attorney General, for the State. *Sambola & Atocha*, for defendants and appellants.

LUDELING, C. J. In this case there are several bills of exceptions to the rulings of the judge *a quo*.

It will be necessary to notice only one of them. The State offered as a witness one Ward, to prove admissions made by the prisoners. Objection was made to permitting the witness to testify, on the ground that he was disqualified by law from testifying, having been convicted of an infamous crime. A pardon of the Acting Governor, P. B. S. Pinchback, was produced. It was granted after the convict had served out the term of his imprisonment, and it is denied that in such a case the Governor had the right to grant a pardon. Such is our opinion. The Governor may pardon a convict while some portion of the penalty after judgment is unsatisfied, but when the judgment has been satisfied there is nothing to pardon. By a rule of evidence one convicted of an infamous crime is disqualified from giving evidence in a court of justice, and we know of no law which authorizes the Governor to remove the disability except by a pardon legally granted. It is from the penalty inflicted by the judgment of the court that the Governor can pardon, and not from the consequences of a civil rule resulting from a former conviction. As well might it be claimed that the Governor could grant indulgences in advance of the commission of crimes.

The judge erred in permitting the witness to testify. It is therefore ordered and adjudged that the verdict of the jury and the judgment of the court be set aside, and that there be judgment remanding the case for a new trial, according to law.

ON REHEARING.

MORGAN, J. The defendants, prosecuted for murder, found guilty without capital punishment, and condemned to imprisonment at hard labor for life, have appealed from the sentence pronounced upon them, and present several grounds for a reversal of the decree rendered against them. These errors are assigned in the bills of exceptions, which come up with the record, and which we proceed to examine in the order in which we find them stated in their counsel's brief.

First—It is contended that there was error in the ruling of the district judge, who refused a continuance in order that the prisoners might obtain testimony from Europe, to establish the fact that the man alleged to have been murdered was the nephew of Martini. The judge was right. The relationship of the parties had nothing to do with the guilt or innocence of the accused. Whether the deceased was or was not the nephew of the prisoners, the killing, if unlawful and malicious, was murder.

Second—The court ordered that the witnesses for the State and the prisoners be separated, except the physicians. To this exception with regard to the physicians counsel for prisoners objected, and reserved their bill to the ruling of the court. The judge did not err, and the reasons given by him in support of his ruling are satisfactory. "Dr. Jackson," he says, "being the Coroner, was called to testify as such. Dr. Bemiss and Dr. Beard, being required as medical experts as to the cause of death, were permitted to remain to hear the evidence, in order that they might form an opinion as to the cause of death."

Third—The court did not err in permitting Ward, a witness, to testify. He had been convicted of two crimes, and had been sentenced to the penitentiary and to the parish prison. The first objection to him as a witness was that he had been pardoned after his sentence had been completed; the second that the pardon which he produced was not sufficiently proved. With regard to one crime, he was undergoing punishment when the pardon was granted to him. With regard to the other we think it matters not whether the pardon came before or after his term of confinement had expired. Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these, are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been

improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effects would only be a halfway relief. The doctrine, now well recognized upon this subject, we believe, is that a pardon gives to the person in whose favor it is granted a new character and makes of him a new man. When extended to him in prison, it relieves him and removes his disabilities; when given to him after his term of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities.

We think the evidence of his pardon established. He produced it in court. The prisoners contend that the pardon was only completed by the action of the Senate thereon, and that the action of the Senate has not been properly shown. We think it has. In the record we find a communication from the Secretary of the Senate to the acting Governor, informing him that his recommendation for pardon of the man Ward, had been received and that it had been acted upon promptly. This we consider sufficient.

Fourth—The prisoners' counsel say there was error in the ruling of the judge which permitted the following questions to be propounded to one of the leading physicians examined as an expert:

"Doctor, you were present during the trial, at the examination of the witness for the State, in relation to the fact of this young man, the deceased, going to bathe, and to the appearance, marks of violence, and other facts testified by the witnesses. If you could form any correct opinion as to the cause of the death of this young man, state what is your opinion. State the grounds of your opinion as to the cause of death. Were the bruises on the body of the deceased, according to the representations of the witnesses, inflicted before or after death?"

And to the other physician: "Doctor, you were present at the examination of the witnesses in this trial to testify in reference to the condition of a man found in the lake, on the morning of the twelfth August last, the description of the marks about his neck and breast, and the appearance of his body when found? What is your opinion as a medical man as to the cause of death?"

Counsel for the prisoners say, in their brief: "The two doctors answered these questions by giving their opinions of the cause of death from the evidence they had heard. They told the jury that it was their opinion from the evidence they had heard, that the deceased had died from violence; and, as the reason and foundation for their opinion, they recapitulated to the jury the evidence they had heard." It was for the purpose of giving their opinion as to the cause of the death of the deceased that these professional men were put upon the stand. The questions were proper ones, and it was their duty to give

to the jury the reasons upon which they rested their opinions. It is objected that they were physicians in the employ of two insurance offices who had each a policy on the life of the deceased. This objection went to their credibility, but does not make the questions or their answers improper.

Fifth—It was excepted that the jury were not competent to render a verdict, the reason being that the time for which they had been summoned had expired before the verdict was announced. Juries in the First District Court were by monthly terms, beginning the first Monday of each month. The jury in this case were empaneled in the latter part of December. The trial extended over into January. There is no force in this objection. The question has been expressly decided.

The judge did not err in refusing a new trial on the ground that the trial took place only a short time after the indictment was found. The bill was presented on the thirtieth of November, and the trial commenced on the twenty-seventh of December. This gave them ample time to prepare their defense. Doubtless had the time been too short to enable them to do so, the court would have granted them a reasonable extension. Neither did he err in refusing a new trial on the ground that after refusing the prisoners a continuance to enable them to send to Europe for testimony to show that the deceased, whom they were charged with the murder of, was the nephew of one of them, permitted the State to introduce evidence to prove that no relationship existed between them. This evidence seems to have been received without objection—and the motion for a continuance was made before the testimony was offered and received. After the judge had refused the prisoners a continuance in order to enable them to procure evidence of a relationship between the deceased and one of themselves, he would, no doubt, have prohibited the State from proving the contrary, if objections thereto had been made, or if he had admitted it, notwithstanding their objection, he would, on application, have granted them time to produce testimony to the contrary.

So far the rulings of the district judge were correct. But we find in the record the following bill of exceptions:

“Be it remembered, that on the tenth day of January, 1873, the above entitled and numbered cause having been tried and submitted to the jury, and the jury, after being two days and two nights deliberating on their verdict, came into court and, through their foreman, asked the court for further instructions as to the weight to be given to circumstantial evidence; and the court having briefly charged the jury that they were bound to act on circumstantial evidence as much as any other evidence, and being about to return the jury to their room

for further deliberation, the counsel for defendant was about to ask the court to give the jury a more explicit charge of the character of the circumstantial evidence which was entitled to consideration by the jury—when the court interrupted the counsel, and absolutely refused to hear what he had to say, or even to address the court upon the right of asking additional charges on the particular information asked by the jury; and to this action and decision of the court the defendants, by their counsel, duly excepted, and the exception was ordered to be made part of the record of the case."

In this it is obvious that the judge erred, and that he refused to the prisoners a most important, and, in this instance, vital right. The record shows that their trial commenced on the twenty-seventh December, and that it continued from day to day (Sundays and the first of January excepted) until the seventh January, when it was submitted to the jury. The jury remained out until the tenth. They then came into court and asked for further instructions as to the weight to be given to circumstantial evidence. A short time after they received the charge of the judge upon this subject, they returned with a verdict of guilty. It is therefore evident, that upon the thread of circumstantial evidence their fate depended. In this condition, it was unquestionably their right, after the court had, as is stated, briefly charged the jury, to require that the whole law upon the subject should have been given to them. For it is apparent that the charge of the judge, as far as it went, might have been correct, and yet, by suppressing an important part thereof, have been fatally and illegally injurious to them.

For instance: If the court had charged the jury that they were bound by circumstantial evidence, and had stopped there, the law would have been properly stated. But if the prisoners had requested the judge to add that in an indictment for murder, supported entirely by circumstantial evidence, where there was no fact which, taken alone, amounted to a presumption of guilt, they must find that those circumstances must be such as to be inconsistent with any other rational conclusion than that the prisoners were the guilty persons, before they could find a verdict against them, they would only have asked for instructions which is recognized law. Having refused to even hear their counsel, was an error which he should have corrected on the spot or granted the prisoners a new trial. The reason given by the judge for refusing to hear the counsel, that "the granting of the request of counsel would have been tantamount to a rehearing of the case, as the Attorney General would have had the right to ask counter instructions," is not satisfactory. The Attorney General, as well as the counsel for the prisoners, had the right to ask the judge, when the jury returned into

State of Louisiana v. Baptiste and Martini.

court, that they be instructed in a particular manner, and either had the right to except to his refusal so to do, as either had the right to except to such charge as he may have made.

Neither do we find his other reason, that "the practice of this court for twenty-five years has been to refuse such applications, and I find no precedents in the books to justify granting the same," conclusive. If it has been the practice in the court over which he presides, for twenty-five years to deny to prisoners on trial before it a right which is accorded to them by law, it is time the practice should be reformed. It is possible that he can "find no precedent in the books for granting the same," but we have not been referred to any where the right has been denied, and we know of none.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be reversed, and that the case be remanded for a new trial in conformity with the principles of law herein laid down.

HOWELL, J., *dissenting*. The bill of exceptions to the refusal of the judge to hear defendant's counsel in asking for "a more explicit charge of the character of the circumstantial evidence, which was entitled to consideration by the jury," does not show what the desired, additional charge was, nor in what the charge given was defective, and, therefore, does not enable us to determine whether the request of defendant's counsel should have been granted, even conceding that he was entitled to make the request at the time he desired to make it.

The simple fact that the judge refused to listen to him does not prove that what he wanted should have been granted, nor that the charge given was imperfect or wrong.

I think the defendants are not in a position to obtain any aid from this court.

No. 5067.

PARISH OF EAST FELICIANA ex rel. J. OSCAR HOWELL, Tax Collector,
v. JOHN GURTH.

The defendant's objection is that the law under which the parish tax is levied on retail liquor dealers in the parish of East Feliciana, is violative of the one hundred and eighteenth article of the State Constitution, because the tax is not uniform, inasmuch as it is regulated by the amount of business which is done; those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5000, another sum, and so on. This objection is fatal.

A PPEAL from the Parish Court, Parish of East Feliciana, *Hughes*, J. F. D. Brame, District Attorney, *pro tem.*, for plaintiff and appellee. *Kernan & Lyons*, for defendant and appellant.

Parish of East Feliciana ex rel. Howell, Tax Collector, v. Gurth.

MORGAN, J. This is a suit to enforce the payment of a parish license tax of twenty-five dollars for keeping a billiard table, and eighty-five dollars license as a retail liquor dealer, and to injoin him from prosecuting these occupations until his taxes are paid.

The defense is that the parish has no right to levy or collect any license tax, and that the tax as levied by the police jury is unequal on all persons who pursue the occupation of retail liquor dealers, and in this regard violates the one hundred and eighteenth article of the Constitution, and is therefore null and void.

The power of police juries "to impose whatever parish tax they may see fit on all keepers of billiard tables and grog shops" is given, in terms, by the two thousand seven hundred and forty-third section of the Revised Statutes of 1870, and it is not contended or shown that the keeper of every billiard table in that parish is not taxed the same sum for carrying on that occupation.

The second objection is that the law under which the tax is levied violates the one hundred and eighteenth article of the Constitution, which declares that taxation shall be uniform throughout the State. The objection is that the sum taxed is regulated by the amount of business which is done, those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5000, another sum, and so on. This objection is fatal. See *State v. Endom*, 23 An. 663.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court, in so far as it enjoins the defendant from keeping a billiard table until he pays the tax of twenty-five dollars, be approved; and it is further ordered, adjudged and decreed that in all other respects the judgment be avoided, annulled and reversed, and the injunction dissolved. Defendant to pay the costs in the court below; plaintiff to pay the costs of appeal.

No. 3238.

B. K. HUNTER v. M. J. DUNHAM et al.—T. H. J. RICHARDSON,
Intervenor.

The plaintiff being ostensibly the owner, under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner and as such entitled to both the property and its revenues, he must seek his remedy in a different direction.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
A Orsborn J. B. A. Hunter, for plaintiff and appellee. **William A. Seay** and **J. F. Smith**, for intervenor and appellant.

Hunter v. Dunham et al.—Richardson, Intervenor.

TALIAFERRO, J. The decree just rendered in the case of Thomas H. J. Richardson v. Levin P. Smith, et al., No. 5044, determines the decision to be rendered in this case. B. K. Hunter, the plaintiff in this case, sues Woodward and Dunham for six hundred dollars, the amount for which he leased to them for the year 1869 the land and plantation he purchased at sheriff's sale in the suit of R. A. Hunter v. J. H. J. Richardson, and for which the latter sued B. K. Hunter in the suit No. 5044.

In the suit now before us, Richardson intervened, claiming the rent due by Woodward and Dunham, alleging himself to be the owner of the property, and that he himself had rented the premises in question to the lessees, Woodward and Dunham, for the year 1869, at the price of six hundred dollars.

The defendants answered in substance that they had no further interest in the controversy than being secure in paying the amount of their indebtedness to the party legally determined to be entitled to it. There was judgment dismissing the intervention and decreeing the defendants to pay six hundred dollars, the amount sued for, to the plaintiff, B. K. Hunter. The intervenor appealed.

We think the judgment correct. Béing ostensibly the owner under his purchase of the property at sheriff's sale, he was entitled to its revenues. If as the real owner, and as such entitled to both the property and its revenues, the intervenor will have to seek his remedy in a different direction.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

No. 4968.

JOHN I. ADAMS v. ASA WEBSTER.

Section 8 of act No. 47, of 1873, which disqualifies as a witness a delinquent taxpayer, published as such for thirty days, is unconstitutional.

This provision of the act under consideration is a regulation or rule of evidence enacted by the Legislature. The title of the act should then give some indication of it, which it does not. No one upon reading that title would imagine that the act contained any provision upon the rules of evidence or the right to be a witness in a court of justice.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.* Jury trial. *Bush & Goode*, for plaintiff and appellee. *R. D. Jordan, E. W. Blake, John S. Billin*, for defendant and appellant.

HOWELL, J. This case was before us in the January term of 1873, and was remanded for a new trial. See 25 An. 113.

Upon the trial below the defendant filed the special plea of payment

Adams v. Webster.

and offered his own testimony to sustain the plea, but it was excluded on the objection of plaintiff, upon the ground that he was disqualified as a witness, under section 8 of act No. 47 of 1873, being a delinquent taxpayer and published as such for thirty days.

It is contended by defendant that this provision of said act is in violation of article 114 of the Constitution, because its object is to establish a rule of evidence, and is not expressed in the title. The title is "An Act to enforce the payment of taxes due the State, providing for the seizure and sale of the property of delinquent taxpayers, and regulating the proceedings against them and against their property and tenants."

Section 8 directs the Auditor to publish the names of the delinquent taxpayers, with the residence of and the amount due by each," and such delinquent taxpayer shall, after thirty days, forfeit his right to bring suit or be a witness for or in his own behalf, before any justice, parish, district or State court, etc."

Plaintiff's counsel, in his brief, says: "that the Legislature has authority to close the door of the courts to any litigant by inhibiting him from bringing or defending suits, is a proposition too monstrous to be entertained for a moment, but the question of evidence is one exclusively under legislative control. The courts of the country are open to all, whether native born or alien, but no one has a constitutional right to give testimony."

This virtually admits that the provision of the act under consideration is a regulation or rule of evidence enacted by the Legislature. The title of the act should then give some indication of such object. No one, we presume, upon reading the above title, would imagine that the act contained any provision upon the rules of evidence, or the right to be a witness in a court of justice. We must, consequently, hold such a provision unconstitutional, and give the defendant an opportunity to be heard as a witness.

It is therefore ordered the judgment and verdict herein be set aside, and this cause remanded to be proceeded in according to law, costs of appeal to be paid by appellee.

Cora and Louisa Brusle and Husband v. Mrs. Hamilton—Hebert, Intervenor.

No. 5081.

CORA and LOUISA BRUSLE and HUSBAND v. MRS. LAVINIA JANE HAMILTON, widow of R. C. Downes ; O. P. HEBERT, Intervenor.

The special mortgage given by the natural tutrix of the plaintiffs in 1858 was strictly in conformity to law, and the tacit mortgage sought to be enforced against her or those who hold under her was legally extinguished.

It is well settled that the holder of property under recorded titles, can give a valid mortgage thereon where the mortgagee has acted in good faith, and the transaction is a real one, regardless of the simulation of the mortgageor's title.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Cole, J. E. B. Talbot*, for plaintiffs and appellants. *Barrow & Pope*, for defendant and appellee and for intervenor.

WYLY, J. The plaintiffs alleging they have a tacit mortgage on the lands which their natural tutrix sold to the defendant, Mrs. Downes, in 1854, and that by a clause in the sale the vendee agreed to pay each heir his virile share, on arriving at the age of majority, out of the price remaining in her hands reserved as protection against their tacit mortgage, sue her to recover the sum of \$2021 04, due each of the plaintiffs, and also to enforce the tacit mortgage which they claim on said lands. They also sue to annul, for simulation, the sale of the lands from Dupuy and Greaud by their tutrix in 1858, upon which a special mortgage was given by her in lieu of their tacit mortgage, pursuant to section seven of the act approved fifteenth of March, 1855, and also to have declared null said special mortgage on account of said simulation.

O. P. Hebert, the son of the defendant, Mrs. Downes, intervened, claiming that he is the owner of the lands upon which the plaintiffs seek to enforce their alleged mortgage, having purchased the same at a judicial sale to enforce his tacit mortgage against the defendant, Mrs. Downes, his natural tutrix. He also alleges that the mortgage under which he acquired the property is superior in rank to all others bearing thereon. He also adopts the answer of the defendant, Mrs. Downes, alleging that the plaintiffs' tacit mortgage was extinguished by the special mortgage on other lands which their natural tutrix gave in 1858, pursuant to the provisions of the act of fifteenth of March, 1855, and further alleging the slave consideration of the debt which the plaintiffs are seeking to enforce in this suit.

The court rejected the demand of the plaintiffs, decreed that the tacit mortgage of the plaintiffs, bearing on the land in question, was extinguished by the special mortgage given by their natural tutrix in 1858, and decreed that the tacit mortgage of the intervenor, O. P. Hebert, was superior in rank to the special mortgage given by Mrs. Downes to Mrs. Brusle, to secure the purchase price of said lands. From this judgment the plaintiffs appeal.

Cora and Louisa Brusle and Husband v. Mrs. Hamilton—Hebert, Intervenor.

Section seven of the act of fifteenth of March, 1855, "An Act relative to minors," declares "that any surviving father or mother who shall hereafter become the tutor of their minor children, may give a special mortgage on immovable property, not including slaves, for the security of the right and property of their said children, and the faithful discharge of their functions as tutor; provided, that a meeting of the family of said minors, duly called according to law, on the petition of said father or mother, shall declare that the property offered to be specially mortgaged is in their opinion of sufficient value to secure the rights of the children in capital and interest. From and after the execution of the special mortgage by the natural tutor, as aforesaid, all the remaining property of the father or mother acquired or to be acquired, shall be completely discharged from the legal mortgage arising from the tutorship." The special mortgage given by the natural tutrix of the plaintiffs in 1858, was strictly in conformity to the statute referred to, and we are of opinion that the tacit mortgage sought to be enforced, was legally extinguished. The simulation of the title of the natural tutrix, if such were the case, did not injure the plaintiffs nor in any manner impair the security afforded them by the special mortgage; because it is well settled that the holder of property under recorded titles, can give a valid mortgage thereon where the mortgagee has acted in good faith and the transaction is a real one, regardless of the simulation of the mortgageor's title. Besides, this is not a controversy with the natural tutrix, but between the plaintiffs and third parties.

The intervenor sets up a title to the property, which was acquired under the enforcement of his tacit mortgage against the defendant, Mrs. Downes, and the restoration of the tacit mortgage set up by the plaintiffs would affect his rights to the property.

We think the court did not err in holding the superiority of the mortgage under which the intervenor acquired the property in question. But there was error in rejecting plaintiffs' demand for a personal judgment against the defendant, Mrs. Downes; because by a clause in the act of sale from Mrs. Brusle to her, she assumed to pay each heir, on coming of age, out of the funds in her hands, his virile share of the sum due the minors by their natural tutrix. As the consideration of the debt out of which said shares were to be paid is mixed, part slaves and part lands and movables, and as we are unable from the record to fix the relative amount of each, we will remand the case in order that the court below may determine the amount of plaintiff's claim, recoverable in a personal judgment against Mrs. Downes. 21 An. 757, *Sandige v. Sanderson*.

It is therefore ordered that the judgment herein be affirmed in all

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respects, except wherein it rejects plaintiffs' demand for a personal judgment against the defendant, Widow Downes; and in this respect it is ordered that said judgment be annulled; and it is further ordered that this cause be remanded in order that on a new trial it may be determined what part of the debt sought to be enforced against Mrs. Downes personally, was for lands and movables, and what part for slaves, with instruction that plaintiffs' demand be reduced so as not to embrace the proportion thereof which was for the price of slaves. It is further ordered that appellees pay costs of appeal.

No. 4955.

STATE ex rel. SEMMES & MOTT v. THE JUDGE OF THE SUPERIOR DISTRICT COURT, parish of Orleans.

It is well settled that this court will not exercise a supervisory control over the district courts, and that the writ of prohibition will not be used except in aid of the appellate jurisdiction of this court. Relators have mistaken their remedy in this instance; it was not a writ of prohibition, but an appeal from the order of the Superior District Court, ordering the transfer of the suit of relators from the Sixth District Court to that court.

APPPLICATION for a writ of prohibition against the Judge of the Superior District Court, parish of Orleans. *W. W. King*, for relators. *John Ray*, for respondent

WYLY, J. It is well settled that this court will not exercise a supervisory control over the district courts, and that the writ of prohibition will not be used except in aid of the appellate jurisdiction of this court.

Therefore, when the relator's suit for damages against Charles Clinton was transferred from the Sixth District Court to the Superior District Court by order of the last named court, the relator's remedy was not a writ of prohibition from this court, because the jurisdiction of this court was not involved; but his remedy was an appeal from the order of the Superior District Court, ordering the transfer of the suit to that court. See the case of the State ex rel. D'Meza et al. v. The Judge of the Fourth District Court, 21 An. 123, and the authorities there cited.

It is therefore ordered that the application for prohibition herein be disallowed, and that the petition be dismissed at the costs of the relators.

No. 4966.

FIRST NATIONAL BANK OF MACON v. B. B. SIMMES.

There is no law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

Where the note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage, no other proof than possession is necessary.

The plea that the defendant's title to the land purchased and for which the mortgage note was given is not perfect for the whole, can not be sustained. He does not allege that he has been disturbed in his possession; that he has been sued; or that he is threatened with a suit for the property. Besides, the parties interested in that question, who were called in warranty, are not before this court.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. W. W. King*, for plaintiff and appellee. *Edward Philips*, for defendant and appellant.

LUDELING, C. J. The executory process in this case was enjoined on the following grounds:

First—That there was no authentic evidence of the existence of any such corporation.

Second—That there was no authentic evidence of plaintiff's title to the note.

Third—That the defendant's title to the land purchased, and for which the mortgage note was given, was not perfect for the whole.

First—We do not know of any law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

Second—The note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage; no other proof of ownership than possession was necessary.

Third—The plaintiff in injunction does not allege that he has been disturbed in his possession; that he has been sued; or that he is threatened with a suit for the property. C. C. 2557. Neither are we prepared to say that the objections to the title which he himself urges would be good, if the question was properly before us. But the parties interested in that question, who were called in warranty, are not before us, as no judgment was rendered on the exception filed by them, or on the issues presented by their answer, and they are not before this court.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

Hefner v. Hesse and Vergéz.

No. 4971.

A. HEFNER v. S. HESSE and H. VERGEZ.

It is well settled that want of citation of appeal will be cured where the appellee appears and contests the case on any other ground.

Where there is no note of evidence on the subject in the record, the rule is that the judge who condemned the defendants as commercial partners solidarily on their note, did so on proper evidence.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J. A. F. & Olay Knoblock*, for defendants and appellants. *Goode & Winder*, for plaintiff and appellee.

WILK, J. It is well settled that want of citation of appeal will be cured where the appellee appears and contests the case on any other ground. Therefore when the plaintiff, appellee herein, moved to dismiss the appeal on the ground that the record does not contain all the evidence adduced on this trial, he set up a defense which amounts to a voluntary appearance in the case, and it cured his objection that he was not cited as appellee.

The motion to dismiss the appeal for want of proper citation is therefore denied.

On the merits, the appellants contend that there is no proof that they are liable as solidary obligors on the note which is the basis of plaintiff's action against them.

There is no note of evidence; and the rule is that the judge who condemned the defendants as commercial partners solidarily on their note, did so upon proper evidence. 22 An. 73; 23 An. 393, 504; 24 An. 20.

Judgment affirmed.

No. 5088.

N. D. FUQUA v. JOHN CHAFFE & BRO.

Where the answer is that the mortgage was executed upon the land in favor of defendants before the plaintiff had acquired a homestead right upon it—that is, that Fuqua, while a resident of the parish of Terrebonne, and before he went to reside on the Oak Point plantation, in the parish of Madison, mortgaged that plantation to the defendants;

Held—That the law which conferred the homestead right existing at the time the mortgage was granted, the defendants accepted the mortgage subject to the contingency that might arise in the future, rendering it necessary for the mortgagee to avail himself of the benefit of the homestead law.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. Farrar*, for plaintiff and appellee. *Wm. B. Spencer*, for defendants and appellants.

TALIAFERRO, J. The defendants having a mortgage upon the plantation belonging to the plaintiff, to secure a debt of three thousand

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Case 1
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dollars, and having a judgment by confession, issued execution and caused the property to be seized and advertised for sale. The plaintiff came in by way of third opposition, and opposed the sale, setting up his right of homestead upon the premises, and prayed that a survey be made for the purpose of laying off the quantity of land embracing the improvements which he is entitled to retain by law.

The answer is that the mortgage was executed upon the land in favor of defendants before the plaintiff had acquired a homestead right upon it; that is, that Fuqua while a resident of Terrebonne and before he went to reside on the Oak Point plantation in the parish of Madison, mortgaged that plantation to the defendants. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

We think the judgment correct. The law confers the right and the law existed at the time the mortgage was granted. The defendants accepted the mortgage, subject to the contingency that might arise in the future, rendering it necessary for the mortgageor to avail himself of the benefit of the homestead law.

The plaintiff has fairly made out his case, entitling him to the exemption in his favor.

Judgment affirmed.

No. 5050.

SUCCESSION OF HARRIET L. VAUGHN, on opposition to a rule to sell property to pay debts.

In the succession of Harriet L. Vaughn, the proceeding instituted by Mrs. Gilbert for the sale of property of the succession, by virtue of a judgment rendered in the Fifth District Court against said succession, is opposed by the heirs of the deceased on the ground that the judgment is absolutely null and void.

The district court having acted within its jurisdiction, the judgment rendered in favor of Mrs. Gilbert, whether sufficient proof was administered or not, was not an absolute nullity. The amount involved in that judgment is beyond the jurisdiction of the parish court; and the correctness of the demand upon which it is based, or the question of the sufficiency or insufficiency of the proof in support thereof, can not be adjudicated by the parish court for want of jurisdiction. Besides, a parish court can not revise the judgment of a district court.

A PPEAL from the Parish Court, parish of Iberville. *Crowell, J. Samuel Matthews*, for Mrs. Gilbert et als., appellees. *A. & E. B. Talbot, E. N. Sims*, for the heirs of Harriet L. Vaughn, appellants.

WYLY, J. Widow Marie E. Gilbert, as surviving widow of Wade H. Gilbert and as natural tutrix, instituted proceedings in the parish court against the executor of Harriet L. Vaughn, deceased, under articles 990, 991, 992, C. P., to compel the sale of property sufficient to pay her judgment for \$19,923 56 against said succession.

Succession of Harriet L. Vaughn.

The testamentary heirs of George C. Vaughn, one of the heirs of Mrs. Harriet Vaughn, opposed the proceeding instituted by Mrs. Gilbert for the sale of property, on the ground that her judgment rendered in the Fifth District Court against the succession of Mrs. Vaughn for \$19,923 56 is absolutely null and void; that it was rendered upon the confession of Paul O. Hebert, executor of said estate, without proof to establish the claim; that it was for services pretended to have been performed by the husband of Widow Marie E. Gilbert, as overseer on the plantation of said estate; that if said services were rendered, the executor had no authority to contract for them, as they were in no manner necessary or beneficial to the succession.

This opposition was dismissed on the exception that the parish court was without authority to revise and decree the nullity of a judgment for \$19,923 56, rendered by the Fifth District Court of the parish of Iberville, because the amount involved in said judgment was far beyond the jurisdiction of the parish court. The opponents have appealed.

The district court had jurisdiction, and whether sufficient proof was administered or not, the judgment it rendered in favor of Widow Gilbert was not an absolute nullity. The amount involved in that judgment is beyond the jurisdiction of the parish court, and the correctness of the demand upon which it is based, or the question of the sufficiency or insufficiency of the proof in support thereof, can not be adjudicated by the parish court for want of jurisdiction. Besides, a parish court can not revise a judgment of the district court.

It is therefore ordered that the judgment dismissing the opposition be affirmed with costs.

No. 5076.

E. K. BRANCH v. POLICE JURY, parish of Pointe Coupee.

The work, for which payment is claimed in this case, was adjudicated by one of the inspectors of roads and levees, in the parish of Pointe Coupee; but it is not shown that the police jury ever authorized the work, and that they provided funds necessary to pay for the same in the ordinance creating the debt. This objection is fatal.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J. T. Yoist*, for plaintiff and appellant. *L. B. Olaiborne*, district attorney pro tem. for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment rejecting his demand of \$1527 16, against the parish of Pointe Coupee for building a road and levee in said parish in 1861.

The work was adjudicated by one of the inspectors of roads and

Branch v. Police Jury, parish of Pointe Coupee.

levees in said parish; but it is not shown that the police jury ever authorized the work, and that they provided funds necessary to pay for the same in the ordinance creating the debt. Revised Statutes of 1870, sec. 2786.

Without this essential requisite, the parish of Pointe Coupee cannot be made liable for a debt like that presented by the plaintiff.

Judgment affirmed.

No. 5109.

STATE ex. rel. J. O. HOWELL, Tax Collector, v. CHARLES McVEA.

The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

APPEAL from the Court of Justice of the Peace, Fifth Ward, parish of East Feliciana. *Nelson, J. F. D. Brame*, District Attorney, pro tem., for plaintiff and appellee. *Kernan & Lyons, D. J. Wedge, J. G. Kilbourne*, for defendant and appellant.

TALIAFERRO, J. The defendant appeals from a judgment rendered by a justice of the peace of the parish of East Feliciana, condemning him to pay twenty dollars, the amount of a parish license tax assessed against him for the year 1873, as an attorney at law, and twenty per cent. special damages and five per cent. interest from judicial demand. He resists the enforcement of this tax on the ground that the police jury of the parish has no legal or constitutional power to levy a license tax upon any occupation, trade or calling whatever; that the Legislature is not vested by the constitution with power to levy any specific license tax on any trade, occupation or calling, but only power to levy an income tax in proportion to the business done; that the constitution did not grant to police juries any power to levy an income or license tax on any occupation, trade or calling, and that the license tax demanded from the defendant is unwarranted by law, illegal, and for which he is not liable.

The relator took out an injunction restraining the defendant from the practice of his profession on the ground of his refusal to pay the tax required. The injunction was dissolved on bond.

The relator asks an amendment of the judgment reinstating the injunction.

We think the ground assumed by the defendant not tenable. He concedes in argument that the Legislature has by the constitution the power to levy a license tax, but contends that the constitution has not granted that power to police juries, nor conferred upon the Legislature

State ex rel. Howell, Tax Collector, v. McVea.

the power to delegate it to those bodies. Neither has the constitution expressly conferred upon police juries the power to levy any other tax whatever, nor clothed the Legislature with power to delegate to police juries the power to levy any tax. The defendant holds that "the constitution and laws have conferred ample power upon police juries to raise a revenue from the property of the people sufficient for the administration of parochial affairs, but have not conferred the power to levy the unjust tax upon occupations. The constitution is entirely silent upon this subject. No such body as a police jury is named or recognized in the constitution. But the laws enacted by the Legislature have conferred this power upon police juries and conferred it by delegation, and yet this power of delegation is not mentioned in the constitution because it was wholly unnecessary that it should be. The constitution established the legislative branch of the government and invested it with ample power to enact laws for the interests and welfare of the State, unrestricted save by the prohibitions expressed in the organic law, State or National. The form of its legislation is within its own discretion. For local interests it may, in its judgment, establish parochial or municipal corporations, and clothe them with the power of local legislation necessary for the purposes of their creation. This is not prohibited by the constitution. This doctrine is elementary. It springs from the principles lying at the foundation of government. If, therefore, the Legislature can delegate to a police jury the power to levy a tax for parochial purposes, it may prescribe more than one form in which that tax may be laid. Accordingly we find among the enumerated forms granted to police juries, both the general power to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession, on which the State assesses a tax. We conclude therefore that the police jury of the parish of East Feliciana is vested with power to levy the tax in question, and that the defendant is liable to pay it.

The exception taken to the jurisdiction of the court before which the suit was brought and to the form in which it was brought we think was properly overruled.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Judge Howell took no part in this decision.

Eastin v. Succession of Osborn.

No. 5080.

JOHN A. EASTIN v. SUCCESSION OF WILLIAM H. OSBORN.

The plea of *res judicata* is not tenable, when the decree referred to in support of the plea declares that a judgment of nonsuit is rendered.

Prima facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and the evidence in this case supporting the legal presumption resulting from the acceptance of the draft, that the drawers, either had funds in the hands of the acceptors, or, at any rate, had reasonable grounds to expect that their draft would be honored, said drawers were entitled to notice of dishonor, and on failure thereof were discharged from liability.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *B. J. Bowman*, Judge *ad hoc*, in the place of the district judge recused. *T. O. Manning*, for plaintiff and appellee. *R. P. Hunter*, for defendant and appellant.

LUDELING, C. J. This suit is brought on a draft drawn by J. & W. H. Osborn on Rhorer & Zunts, and accepted by them, dated third of April, 1861, and payable to the order of E. F. Duncan, on the fifth of February, 1862.

John Osborn having taken the benefit of the bankrupt act, the succession of his brother, who had been his partner in planting, is sued for one-half the amount of the said draft.

The defenses set up are, *res judicata*, *prescription*, and a discharge from liability on account of the failure of the holder of the draft to protest the same, or to give the drawers notice of the dishonor of the draft. The plea of *res judicata* is not tenable. The decree referred to, to sustain the plea, in terms declares that a judgment of nonsuit is rendered.

On its face, the draft sued upon is prescribed; but it is urged that prescription was interrupted by the suit in which the before mentioned judgment was rendered. This on the other hand is denied, because it is alleged that there was no citation to W. H. Osborn. There was an acceptance of service of citation and petition by John Osborn, and subsequently an answer was filed for all the defendants. The code declares that the course of prescription is interrupted by a citation. Whether an acceptance of service of petition and citation, without any citation in fact, would meet the requirements of the law is unnecessary to decide, as we have concluded to decide the case on the merits.

The draft was drawn by planters on their factors, who accepted the same.

Prima facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor. 1 Para. Bill and Notes p. 323.

In this case the testimony is somewhat conflicting as to whether J. & W. H. Osborn had funds in the hands of the drawees. Marcus J. Zunts states that "as a firm" they had not. While J. Osborn swears

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that they had. But the witness Zunts, in answer to the question, "had John & W. H. Osborn, or either of them, any reason to suppose or believe, or expect that your firm would pay this draft," etc., answered "Yes, as acceptor of the draft and to protect the credit of the house, they had every reason to believe that we would raise the money to pay the draft to save our credit as merchants. They speculated on this common rule among commission merchants and held back their produce," etc. He further testifies that prior to the formation of the planting partnership, both partners individually did business with J. M. Rhorer & Co., of which he, Zunts, was a member, and that each of them had "an account upon the books of the firm of Rhorer & Co. for the purpose of making remittances of drafts for collection, and drawing against such collections to suit their convenience." The drawees and acceptors appear to be the successors of J. M. Rhorer & Co., and J. & W. H. Osborn as a firm, continued their business with them. But John Osborn swears that they had funds in the hands of the drawees, and that they had reasonable grounds to expect their draft to be honored. He further swears that the reason the sugar crop was not shipped, was because Rhorer & Zunts, the drawees, advised them not to ship it, and afterwards the city fell into the hands of the federal army.

We think the evidence supports the legal presumption resulting from the acceptance of the draft by the drawees, that the drawers had funds in the hands of the acceptors; at any rate, it establishes that the drawers had reasonable grounds to expect that their draft would be honored, and they were entitled to notice of dishonor.

It is therefore ordered and adjudged, that the judgment of the lower court be annulled, and that there be judgment rejecting the plaintiff's demand with costs of both courts.

No. 5048.

NATHAN LORIE *v.* BENNETT HITCHCOCK, tax collector et al.

The ordinance of the police jury of the parish of Concordia, which provides for the levying of a special tax to be known as a contingent tax, to be appropriated to the payment of all warrants drawn on the same for the payment of attorney's fees—any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same, is violative of the 2745th section of the Revised Statutes.

In so much as concerns the payment of attorney's contingent fees, it will be time to levy and collect a tax to pay the same when the contingency which may make them due, shall have arrived. The contingency may never happen, and there would then have been no necessity for collecting the tax.

A PPEAL from the Parish Court, parish of Concordia. *Meng, J. G. Spencer Mayo*, for plaintiff and appellee. *O. Mayo*, Parish Attorney, and *George S. Sawyer*, for defendant and appellant.

Lorie v. Hitchcock, Tax Collector, et al.

MORGAN, J. The police jury of the parish of Concordia, employed counsel in the city of New Orleans to represent the parish in cases pending against it in the Circuit Court of the United States. The terms of the counsel's employment were, one thousand dollars as a retaining fee, "and a contingent fee of ten per cent. on the amount recovered by the result of said suits exonerating the parish from liability to pay said debts, to be paid on his own warrant, indorsed by the president of the board; one thousand dollars, paid as a retainer, to be deducted." To provide for the payment of this fee, the board ordained that there should be levied and assessed a special tax of one-half per cent. on all the taxable property as borne on the tax roll of 1872, to be collected in United States currency alone, one-half on or before the first day of December, 1873, and one-half on or before the first day of December, 1874, as a special fund, to be known as the contingent fund, to be appropriated: first, to the payment of all warrants drawn on the same for the payment of attorney's fees as above set forth. Any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same.

The tax under this ordinance for 1873 was collected. Plaintiff enjoined the tax collector from proceeding against him in the collection of the tax for the year 1874. The injunction was made perpetual.

In so far as the ordinance had for its object the levying of a tax to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, we think it violates the 2745th section of the Revised Statutes, which declares that police juries, before they fix and decide on the amount of taxes to be assessed for the current year, shall cause an estimate to be made, exhibiting the various items of expenditure, and shall cause the same to be published in the official newspaper, the requirements of the law not having been complied with.

As for the payment of the contingent fees, we think it will be time enough to levy and collect the tax to pay them when the contingency which will make them due will have arrived. It is possible that the cases in the Circuit Court may be lost. In this event the fees would not have to be paid, and there would have been no necessity for collecting the tax.

The judgment of the parish court is affirmed.

Willis v. Peet.

No. 5078.

JOHN W. WILLIS v. LEWIS L. F. PEET.

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A judgment can not be annulled unless all the parties to it are cited.

APPEAL from the Thirteenth Judicial District Court, parish of Texas. *Hough, J. E. D. Farrar & T. P. Clinton*, for plaintiff and appellee. *R. Lewis*, curator *ad hoc*, for defendant and appellant.

MORGAN, J. Plaintiff seeks to annul a judgment rendered in favor of Peet against the succession of Thomas J. Buck.

Peet is a citizen of the State of Mississippi, and is sought to be brought into court through a curator *ad hoc*. The succession of Buck has not been made a party. This was necessary. We can not annul a judgment unless all the parties to it are cited.

Plaintiff asks also for damages against the defendant for slander of title, but as this demand could only arise in case the judgment attacked should be declared a nullity, and as we have come to the conclusion that the suit to annul the judgment can not be entertained, because of the want of proper parties, we can not consider the mere incidental demand of damages.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that this suit be dismissed as in case of nonsuit, plaintiff to pay costs.

No. 5033.

FRANK D. HENDERSON v. JOSEPH HOY and SHERIFF.

If the description of property to be sold is insufficient, the owner thereof can not be injured, because there will be no sale. Therefore this is no ground for an injunction by the defendant in execution.

The plaintiff is not entitled to claim the homestead he pretends to be entitled to, out of the property seized, which is his undivided sixth interest in a tract of land containing some five hundred acres, which he held in common with other heirs. What is seized is not susceptible of being a homestead; it is only plaintiff's share in the land; it is an incorporeal thing; and what is incorporeal can not be the object of the operation of the homestead law.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. Manning*, for plaintiff and appellant. *Hunter*, for defendant and appellee.

WYLY, J. The plaintiff enjoined the sale under execution of the property described in the petition on the grounds:

First—That the description of the property is vague and indefinite.

Second—That said property is exempt from seizure, because it is his homestead.

If the description of the property is insufficient the plaintiff can not

Henderson v. Hoy and Sheriff

be injured, because there will be no sale. Therefore this is no ground for an injunction by the defendant in execution. But the description of the property on the writ and in the advertisement is sufficient. It proposes to sell the undivided interest of Frank D. Henderson, as one of the heirs of J. H. Henderson, in the succession of Francis and Rosena Henderson, deceased, and the right, title and interest of said Frank D. Henderson, in the succession of his father, J. H. Henderson. If the description be sufficient for the plaintiff to carve out his homestead, it ought to be sufficient for a sale to pay his judgment creditor.

Second—The plaintiff is not entitled to claim the homestead out of the property seized, which is his undivided sixth interest in a tract of land, containing some five hundred acres, which he holds in indivision with the other heirs of J. H. Henderson.

The property or right seized is the plaintiff's share in the land which belongs to the six heirs of J. H. Henderson. There is no particular part of the five hundred acres that he can rightfully claim as his own. He only has a share of one-sixth in each and every acre. He may never become the sole owner of any part of it, because it may happen that a partition by licitation may be deemed most advantageous to the owners, and the partition be made in that way.

But a sufficient answer to plaintiff's pretensions on this point is, that the property seized is not susceptible of being a homestead; it is only his share of the land; it is an incorporeal. And an incorporeal can not be the object of the operation of the homestead act.

It is therefore ordered that the judgment herein in favor of the defendants be affirmed with costs.

No. 5103.

SUCCESSION OF ESTHER PORET—Opposition to Application for Administration.

A party can not, without showing an interest in the matter, be permitted to interfere with the final settlement of an estate between the heirs, and to pray that the public administrator of the parish be appointed to administer said estate and have an appraisement thereof made.

If the partition entered into between the heirs, and of which the plaintiff complains, is irregular and illegal, it is not to be corrected by taking out an administration.

APPEAL from the Parish Court, parish of East Baton Rouge. *Davis, J. S. P. Greves, E. W. Robertson*, for applicant and appellee. *J. W. Burgess, Fuqua & Callihan*, for opponents and appellants.

TALIAFERRO, J. In this case Pierre Lebreton, alleging that he has an interest in the administration and final settlement of the succession of Esther Poret, an interdicted person, who died in the year 1861, prays

that the public administrator of the parish of East Baton Rouge be appointed to administer her estate, and that an appraisement thereof be made. Esther Poret left no forced heirs. Her estate fell to her two sisters and a brother. One of the sisters died, leaving two minor children, represented by their father and natural tutor, William Hearsey. The interest which the petitioner declares he has in the proper administration of this succession is, that these minors Hearsey are his presumptive heirs. He alleges that Leopold Poret, the brother of Esther Poret, a resident of France, renounced her succession. This application for an administration of the estate of Esther Poret was vigorously opposed by the heirs, Mrs. Guzman, William Hearsey, the father and tutor to the minors, and Mrs. Zulme Hearsey, claiming to be the transferee of Leopold Poret. The opposition is founded upon the grounds following :

First—That the application shows no ground for the appointment of an administrator, but on the contrary it shows that the estate has been settled, and there is no pretense there are any debts.

Second—That after the death of Esther Poret the heirs took possession of and partitioned the estate among themselves, and if there are any errors in the partition, they can not be corrected by the public administrator, who has no authority to represent the majors or minors, and revise and correct partitions and settlements made between heirs.

Third—That if Leopold Poret ever renounced the succession, his renunciation inured to the benefit of these heirs, who accepted, and gave no right to the public administrator to take charge of the estate.

Fourth—They deny that the estate is or ever was vacant.

Fifth—They peremptorily except to the right of Pierre Lebret to interfere in any manner in the estate, and especially to his attempt herein made to inquire thus collaterally into the conduct of William Hearsey, tutor.

Sixth—They peremptorily except that Pierre Lebret has not and does not pretend to be either an heir or a creditor, and that he is absolutely without right or interest in the succession of Esther Poret.

The judgment of the court *a qua* was in favor of the plaintiff, Lebret, decreeing that the public administrator be appointed to administer the estate, and that an inventory be made. From this judgment the opponents have appealed.

An examination of the record in this case satisfies us that the judgment of the parish court is erroneous. The applicant, Lebret, is shown to be without any interest whatever in the matter; the minors, he pretends, are his presumptive heirs, are represented by their father and natural tutor, who opposes his application. He is neither an heir nor a creditor. Neither does he allege there are any debts against the

Succession of Esther Poret.

succession. The partition entered into between the heirs, and of which he complains, if irregular and illegal, is not to be corrected by taking out an administration. We think the opposition should have been sustained, and the application for administration dismissed.

It is therefore ordered that the judgment appealed from be annulled and set aside. It is further ordered that the opposition be sustained, and the suit dismissed at the costs of the applicant.

No. 5038.

JOHN W. JOHNSTON v. GUSTAVUS & HYPOLITE LABAT.

The objection that the partition among certain heirs is void, on the ground that it was not evidenced by a written act, is unsound, when they went into possession and were permitted to prove by parol the division or partition.

If it be granted that a partition is virtually a sale of each heir to the others, of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborne, J. B. A. Hunter*, for plaintiff and appellant. *William A. Seay*, for defendants and appellees.

WYLY, J. Nearly forty years ago Francis Labat and his wife, Ann Labat, died leaving a small succession consisting of four hundred acres of land and a town lot in the village of Pineville. They left three heirs, the two defendants and their brother Arthur, all of age, and who doubtless accepted the succession unconditionally. Over thirty years ago they divided the land among themselves, and Gustavus (who bought the part belonging to Hypolite) has been in the undisturbed possession of his part thereof ever since said division. But the partition was not evidenced by a written act.

Arthur Labat died shortly after the partition, leaving a surviving widow and children, from whom the plaintiff acquired title to that part of the property or estate belonging to Arthur Labat. This was in 1871.

In 1872, the plaintiff sought, in the parish court, and was permitted to open the succession of Francis and Ann Labat which had been accepted unconditionally by the heirs of age, and which, therefore, ceased to be a succession some thirty years before the said mortuary proceedings were had. After the attempt to settle the said succession in the parish court was thwarted by the decision of this court in May 1873, the plaintiff brought this suit for partition in the district court.

The court below found, and we think correctly, that the only property remaining in indivision was the town lot in Pineville, and ordered it to be partitioned. The demand for the partition of the four hundred acres of land was rejected on the ground that it had long since been

Johnson v. Gustavus and Hypolyte Labat.

divided among the heirs, and the title of the defendants was perfected, if in no other way, by the prescription of thirty years.

There is no doubt that Arthur Labat consented to the division of the land, and agreed that the defendants might hold as owners the part thereof occupied by them. Their possession as owners for thirty years would of itself give the defendants title, regardless of the title they acquired by succession and partition. But it is objected that the partition among the heirs of Francis and Ann Labat was void, because it was not evidenced by a written act. The proposition is unsound, because the defendants went into possession, and they have been permitted to prove by parol the division or partition. Grant that a partition is virtually a sale of each heir to the others of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection.

It is useless for the plaintiff to contend that Arthur Labat died before his mother, and therefore could not have accepted her succession. That question is *res judicata*, having been settled in the decision of this court in May 1873, in a controversy between the present parties.

It is therefore ordered that the judgment herein be affirmed with costs.

No. 5094.

MYRA F. MINOR v. JAMES L. BARKER, Auctioneer, et als.

An auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

APPEAL from the Parish Court, parish of Iberville. *Crowell, J. A. & B. B. Talbot, William A. Elmore*, for plaintiff and appellee. *Barrow & Pope*, for defendant and appellant.

HOWELL, J. The plaintiff having a judgment against the succession of James N. Brown, to be paid in due course of administration, instituted this as a third opposition to the payment to Isaac D. Brown, legatee, of the proceeds of the sale of the succession property in preference to her claim, and asking that the auctioneer be ordered to retain in his hands a sum sufficient out of said funds to pay her said claim. The dative testamentary executrix excepted to the form of proceeding on the ground that the proceeds of the sale must go into the hands of the said executrix, and plaintiff's rights be settled in the account to be filed. This exception should have been maintained.

Minor v. Barker, Auctioneer, et al.

The auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

It is therefore ordered that the judgment appealed from be reversed, and that the exception herein be maintained, and the third opposition dismissed at cost of plaintiff therein.

No. 5161.

STATE ex rel. MARY B. CALDWELL v. THE JUDGE OF THE FOURTH DISTRICT COURT, Parish of Orleans.

A rule by relator was taken in the court *a qua* to show cause why her opposition to the homologation of the report of certain experts should not be maintained, and an order of sale be rescinded. On trial, the opposition was dismissed, and the application to rescind the sale discharged. The judge *a quo* refused to grant an appeal. Among other reasons for it he alleged that these orders are merely interlocutory, and can not operate an irreparable injury. This is an error. The facts are such as to entitle relator to an appeal.

APPPLICATION for a mandamus to the judge of the Fourth District Court, parish of Orleans. *Race, Foster & Merrick*, for relator *Judge Lynch, in propria persona*, and *W. H. Rogers*.

TALIAFERRO, J. The relator complains that the judge of the Fourth District Court of New Orleans refuses to grant her appeals from two orders rendered by him in a certain suit pending in that court, and numbered on its docket 41,696, which orders she alleges would work irreparable injury to her if carried into effect. She prays this court to issue a mandamus, commanding the said judge to grant the appeals prayed for to this court.

The facts presented by the petition are, that in a certain case, numbered as aforesaid, pending in the Fourth District Court of New Orleans, entitled *Mary Malady v. Wm. Malady and Mary Caldwell*, the plaintiff, Mary Malady seeking to have a partition made of certain property in New Orleans, consisting of houses and lots owned in common by her with the defendants, obtained an order appointing experts to examine and report, whether the property is susceptible of division in kind or not. The report of the experts was made and filed in court on the seventeenth of January, 1874, declaring that the property is not susceptible of division in kind. On the same day, an order was rendered at the instance of the plaintiff, homologating the report of the experts. On the twenty-sixth of January, within ten days of the filing in court of the report of experts, an opposition to the homologation of the report was filed on behalf of the relator, alleging various grounds of

State ex rel. Caldwell v. The Judge of the Fourth District Court, parish of Orleans.

opposition. On the same day a petition was filed by Mary Malady, praying that the property should be sold; and on the thirtieth of January, an order of sale was rendered. On the tenth of February, it seems, the relator took a rule on the plaintiff to show cause why the order of sale should not be rescinded. On the second of March both the opposition to the homologation of the report of the experts and the rule to rescind the sale were tried. The opposition was dismissed and the rule to rescind discharged.

It is from these orders that the relator complains. She was refused appeals. A rule *nisi* was granted, and the judge answered at some length. He assigns various reasons for refusing the appeals prayed for, and among them, that the orders are merely interlocutory, and in his opinion, not such as can operate an irreparable injury. Upon consideration of the facts of this case as we find them, we come to a different conclusion. The relator swears that irreparable injury will result to her from the denial of the appeals, and we think she presents a case entitling her to the right of appeal. It is therefore ordered that the rule be made absolute, and that the respondent be ordered to grant the relator the appeals prayed for, upon compliance on her part with the law, by giving good and sufficient security, conditioned as the law directs.

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No. 5062.

SUCCESSION OF W. O. WINN—O. K. HAWLEY, Public Administrator,
v. M. E. RICHARDS, Executrix.

The interference of the public administrator in this instance, on whose application defendant was removed from her trust as executrix, and himself appointed *dativo* testamentary executor, was officious, and the judgment is erroneous. This is not a vacant succession; neither had the person appointed executrix failed to qualify, nor had she been removed, nor had any of the creditors asked for her removal.

A PPEAL from the Parish Court, Parish of Rapides, *Ledoux, J. B. J. Bowman*, for plaintiff and appellee. *M. Ryan*, for defendant and appellant.

LUDELING, C. J. In May, 1870, John S. Mayfield, claiming to be a creditor for \$45,000, took a rule in the parish court to compel Mrs. Richards, the testamentary executrix, to render an account and to pay the debts of the estate. The executrix denied that Mayfield was a creditor of the estate, and alleged that the parish court had no jurisdiction to decide upon Mayfield's claim *ratione materiae*. The court admitted evidence to show that Mayfield was a creditor, and ordered the executrix to render an account, but decided that the parish court had no jurisdiction over his claim. From the order to render an

Succession of Winn—Hawley, Public Administrator, v. Richards, Executrix.

account an appeal was taken. The executrix failed for some time to render the account, whereupon the public administrator asked to be appointed dative testamentary executor, as the testamentary executrix was in contempt of the court. Shortly thereafter, the executrix filed an account which was ordered to be advertised. The public administrator then filed an exception to the filing of said account, on the grounds that she was not the qualified representative of the estate, being in contempt of the court.

Some of the creditors of the succession filed oppositions to the account, but none of them asked for the dismissal of the executrix.

There was judgment removing the executrix from her trust and appointing the public administrator dative testamentary executor, and the executrix has appealed.

The interference of the public administrator in this litigation is officious. This is not a vacant succession; nor had the person appointed executrix failed to qualify, nor had she been removed. Neither did any of the creditors ask for her removal. In a proper case, should it be brought before us, we will decide whether or not cause for the removal of the executrix exists; but we can not do so at the suit of a stranger to the succession, showing no interest in it whatever.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the executrix rejecting the demands of the public administrator, with costs in both courts.

No. 5057.

SUCCESSION OF HENDERSON RANDALL.

Margaret Morgan, the surviving wife and natural tutrix of the child of the deceased, opposes a creditor's application for the administration, and claims it in her own right and as tutrix of her child.

In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Therefore, the fact of deceased having married while a slave in Mississippi, did not prevent, notwithstanding the former wife still continued to exist, his lawfully marrying Margaret Morgan in Louisiana, where he resided after his emancipation. Besides, it is not in evidence that Margaret Morgan knew of his having another wife when he married her.

A PPEAL from the Parish Court, parish of Madison. *Dennis, J. John Ray and J. H. Crawford*, for Margaret Morgan, appellant. *Sealey, Morrison* for Amis, appellee.

LUDELING, C. J. This is a contest for the administration of Henderson Randall's estate. Amis, a creditor, petitioned to be appointed administrator.

Succession of Henderson Randall.

Margaret Morgan, the surviving wife and natural tutrix of the child of the deceased, opposed Amis' appointment and claimed the administration in her own right and in that of her child. And Utz, another creditor, opposed her claim and asked to be himself appointed, as the largest creditor of the estate.

There was judgment appointing Amis, and Margaret Morgan alone has appealed.

It is attempted to defeat the claim of the widow and tutrix of the heir of the deceased, by attempting to show that Henderson Randall had another wife in Mississippi, whom he had married during the existence of slavery.

In the absence of proof to the contrary, we will presume the laws of Mississippi were the same as those of Louisiana regulating the status of slavery, and that the law of both States did not authorize slaves to enter into contracts of marriage so as to create any civil effects. His having lived in Mississippi with another woman as his wife, while a slave, did not prevent his marriage in Louisiana, where he resided, after his emancipation. Besides, there is no evidence that Margaret Morgan knew of his having another wife when he married her.

Margaret Morgan, the widow of the deceased and the natural tutrix of his child, is entitled to the appointment claimed by her. *Sears v. Wilson*, 5 Au. 689; C. C. 1037, 1114.

It is therefore ordered that the judgment of the lower court be annulled, and that there be judgment in favor of Margaret Morgan, appointing her administratrix of the succession of Henderson Randall, according to law. The appellee to pay costs of both courts.

No. 5046.

GEORGE L. WALTON v. HENRY C. YOUNG.

The defense in this suit, instituted on two drafts drawn by defendant, payable to his own order, indorsed by himself, and accepted by Scott & Jackson the drawees, is, that they were transferred after maturity and form a part of unsettled accounts existing between himself and the drawees, upon a full settlement whereof their drafts would be found to be paid.

Being in the possession of the drawees after maturity, the drafts were extinguished either by payment or novation, and they became mere *vouchers* for the amounts charged on the books of the acceptors against the defendant, and the acceptors could not resuscitate the drafts or bills of exchange by reissuing them after maturity and after they had taken them up.

Scott & Jackson, the drawees and acceptors, could not have maintained a separate action on those drafts after having carried them through their accounts current with the drawer. Their only action against the defendant was for any balance due on the account of which said drafts formed a part, and the transferee of Scott & Jackson acquired no greater right than they had.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. Favrot & Lamon*, for plaintiff and appellee. *Herron & Gallagher*, for defendant and appellant.

Walton v. Young.

LUDELING, C. J. The plaintiff sues defendant on two drafts drawn by the defendant, made payable to his own order, indorsed by himself and accepted by Scott & Jackson, the drawees, and on a note drawn by defendant in favor of W. S. Jackson, and by him indorsed in blank.

The answer is a general denial, and that the plaintiff is not the owner of the drafts; that they were transferred after maturity, and form a part of unsettled accounts existing between himself and the drawees, upon a full settlement whereof these drafts will be found to have been paid.

The evidence satisfies us that the drafts were transferred by the acceptors after their maturity. Being in their possession after maturity, the drafts were extinguished either by payment or novation, and they became mere vouchers for the amounts charged on the books of the acceptors against the defendant; and the acceptors could not resuscitate the drafts or bills of exchange by reissuing them after maturity and after they had taken them up. Scott and Jackson could not have maintained a separate action on those drafts after having carried them through their accounts current with the drawer. Their only action against Young was for any balance due on the account of which said drafts formed a part; and the transferee of Scott & Jackson acquired no greater right than they had.

The evidence in the record preponderates in favor of the defense set up, but as Scott & Jackson, or their representatives, are not before the court, we can not decide the question as to the payment of their account. The claim for the amount of the note seems to be established.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiff against the defendant for the sum of four hundred and sixty-six dollars and eighty-five cents, with five per cent. per annum interest thereon from the first day of November, 1871, till paid, and costs of the lower court; and that there be judgment against the plaintiff as in case of non-suit, on his demand for the amount of the two drafts, with costs of appeal.

No. 4926.

SUCCESSION OF WM. COOLEY—On Opposition to Tableau of Distribution.

A contest, to be paid by preference, out of the proceeds of this succession, arose in the court below, under the homestead law, between the vendor of a lot of furniture, the lessor of a house and lot furnished with said furniture, and the tutor of a minor child left in necessitous circumstances. In this court the contest is limited to the homestead claim, and the party asserting the vendor's privilege.

The claim of the minor must prevail. The homestead privilege was given the highest rank with one exception, that of the vendor, and for expenses in selling the property. As there are two privileges of the vendor, that on immovables, which enjoys the highest rank, and that on movables, which holds an inferior rank, the exception can not apply to both, but only to the one holding the first rank—that on immovables. Hence the homestead privilege must prevail over that of the vendor of movables, which itself is inferior to that of the lessor. This construction obviates all difficulty in construing the several articles of the Code bearing on the subject.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Thomas J. Cooley*, for administrator. *E. Philips*, tutor *ad hoc* for the minor; *A. J. Villere*, executor to Fleitas, deceased; and *M. E. Livaudais*, for Mallard, opponent and appellant.

TALIAFERRO, J. The proceeds of the succession, after paying claims of a higher grade than that of the lessor, the vendor and the homestead claim, were reduced to the sum of \$549 92. For this sum a contest arose between a vendor of a lot of furniture, claiming as due him by the estate \$874 50; a lessor claiming \$1500 for lease of house and lot, and the tutor of the minor child of the decedent, left in necessitous circumstances, claiming a thousand dollars under the homestead law. Each of the contestants claimed superiority of privilege. In the court below judgment was rendered in favor of the minor's claim, and the opponent claiming the vendor's privilege, has appealed. In this court the contest is limited to the homestead claim, and the party asserting the vendor's privilege.

The conclusion arrived at by the judge *a quo*, seems to be founded upon these considerations: That as by article 3263 of the Civil Code, the privilege of the vendor on movables sold by him still in the possession of the vendee, is inferior to that of the owner of the house or farm which they serve to furnish or supply, for his rents; and, as it has been determined (succession of Bouvet, 25 An. 431) that the homestead claim confers a higher privilege than that of the lessor, it must be deduced that the words "except those for the vendor's privilege," have reference alone to the privilege of the vendor of real estate; that this construction obviates all difficulty in construing the several articles of the Code bearing on the subject; that the homestead privilege was given the highest rank with one exception, that of the vendor; that as there are two privileges of the vendor, that on immovables, which enjoys the highest rank, and that on movables, which holds an

Succession of Wm. Cooley.

inferior rank, the exception can not apply to both, but only to the one holding the first rank, that on immovables.

We concur with our learned brother of the court *a qua* in the conclusions he arrived at in this case, and adopt them as satisfactorily disposing of the otherwise awkward confliction that would exist between the several privileges contended for in this litigation.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

No. 5049.

JOSEPH MOORE v. MRS. INEZ ROUTH GORDON.

Where the objection was that the plaintiff alleged that the indebtedness of the defendant arose from family and plantation supplies furnished in 1870 and 1871, that the first item appearing on the plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first January 1870, was not, and did not purport to be for such supplies, and was too general and indefinite to admit of proof;

Held—That the objection was well taken and that the testimony offered should have been rejected.

The husband of defendant was the manager of the *Verona* plantation belonging to her, prior to her being separated from him by judicial decree in October 1869. During that year he received supplies from the plaintiff, and the sum of \$3970 charged, as before stated, as the first item on the account sued upon, is inferred to be, for the most part, for the supplies of 1869. It is in proof that for the period of 1870 and 1871, for which the supplies are charged, she had always refused to supply the laborers on her place, which was leased out to them, and had neither authorized her husband nor any other person to contract for supplies. The plaintiff can only have judgment for \$803 18, as the amount of articles established as furnished to defendant and which went to her individual use.

A PPEAL from the Thirteenth Judicial District Court, parish of Tennessee. *Hough, J. L. V. Reeves, R. Lewis, Race, Foster & Merrick*, for plaintiff and appellant. *William B. Spencer*, and *H. R. Steele*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues for \$3220 28 with interest, being as he alleges for family and plantation supplies furnished the defendant during the years 1870 and 1871. The answer denies any indebtedness whatever by the defendant to the plaintiff; avers that the plaintiff's account, if ever really contracted, which she denies, was contracted during the time she was a married woman; that no part of the account inured to her separate benefit; that if any such indebtedness was ever contracted with the plaintiff it was done by her husband without her knowledge, consent, or procurement.

The Judge *a quo* considering that a portion of the articles charged on the plaintiff's account amounting to \$543 60 inured to the separate benefit of the defendant, gave judgment in favor of the plaintiff for that amount, with five per cent. interest from the first of January, 1872. The plaintiff has appealed.

The appellee asks that the judgment of the lower court be amended by rejecting the plaintiff's demand *in toto*. A bill of exceptions was taken to the ruling of the court permitting evidence to be received in relation to such portion of the first item appearing on the plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first January, 1870. The objection is that the plaintiff having alleged that the indebtedness of the defendant arose from family and plantation supplies furnished in 1870 and 1871; the item \$3970 is not and does not purport to be for such supplies, and is too general and indefinite to admit of proof. We think the objection was well taken and that the testimony should have been rejected.

It appears that the defendant was separated in property from her husband by judicial decree in October 1869. The "Verona" plantation, which it seems the defendant is owner of, has been occupied by her since the decree of separation of property, and supplies have been furnished the plantation by the plaintiff since that time; but there is a failure on his part to establish any contract with the defendant for the furnishing of the plantation or to show, except for a small amount, that any of the articles went to her use or benefit. Prior to the date of separation of property, her husband, John Gordon, managed the place, and received in 1869 supplies from the plaintiff, and the sum of \$3970 charged, as we have seen, as the first item on the account sued upon, was for the most part, we infer, for the supplies of 1869. It is in proof that the defendant leased the Verona plantation, during the period for which these supplies are charged, to the laborers on the place, and was under no obligation to furnish them. How this state of things came about is not apparent from anything in the record. The testimony of the defendant is very clear and positive, that in leasing the plantation she has always refused to supply the laborers, and that she has never authorized her husband or any other person to enter into or engage on her part to furnish supplies.

We find no evidence of a countervailing character. After an examination of the evidence we are unable to concur with the judge *a quo* in the amount which the plaintiff establishes as purchased by defendant and went to her individual use. We take the amount stated by the witness R. Murdock, \$303 18, to be the only sum the plaintiff is entitled to have judgment for.

It is therefore ordered that the judgment of the district court be amended by reducing the judgment against the defendant to the sum of three hundred and three dollars and eighteen cents, with five per cent. interest thereon from the first of January 1872, and as thus amended that it be affirmed.

Rehearing refused.

Hoy & Co. v. Eaton & Barstow and Sheriff.

No. 5026.

JOSEPH HOY & CO. v. EATON & BARSTOW and Sheriff.

Some personal property of Weiss, attached at the suit of Joseph Hoy & Co., was ordered to be sold as perishable property pending the attachment suit and bonds were taken by the sheriff for the price thereof.

The bonds, therefore, simply represented the property attached or the proceeds of the sale thereof, and they belonged to Weiss, not to the sheriff, who was a mere stakeholder. There existed no reason why the sheriff could not seize them at the suit of another creditor, as the property of Weiss, subject of course to the prior attachment.

The suspensive appeal taken by Joseph Hoy & Co., from the judgment dissolving their attachment could not prevent Eaton & Barstow from seizing the property attached.

The judgment of the district court dissolving the attachment of Joseph Hoy & Co. having been affirmed on appeal, said attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure, and the proceeding by garnishment on the part of Joseph Hoy & Co. against the sheriff after said seizure, did not affect it, or the rights of Eaton & Barstow under it—being *res inter alios acta*.

The right, to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. had no right to do so.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
Orsborn J. R. A. Hunter, for plaintiffs and appellees. *M. Ryan* and *James G. White*, for defendants and appellants.

LUDELING, C. J. Eaton & Barstow, judgment creditors of one Weiss, caused certain bonds or written obligations in the hands of the sheriff to be seized under an execution in their favor, and Joseph Hoy & Co., also creditors of Weiss, enjoined the sale on the grounds that Eaton & Barstow were not the owners of the judgment under which said bonds were seized; that said bonds were made payable to John DeLacy, sheriff, and that the sheriff being interested, he could not himself seize the bonds in his own hands; that Joseph Hoy & Co. having attached the personal property of Weiss, for the proceeds of the sale whereof the bonds were taken, and a suspensive appeal having been taken from the judgment setting aside the attachment, other creditors of Weiss could not seize the property; that Weiss had real property and it was the duty of the sheriff to seize that before seizing his rights and credits.

There was judgment perpetuating the injunction, and the defendants have appealed.

Whether Eaton & Barstow continued to be the owners of the judgment obtained by them against Weiss or not, is of no concern to Joseph Hoy & Co.

The bonds seized had been given for the price of personal property of Weiss, attached at the suit of Joseph Hoy & Co., and ordered to be sold as perishable property, pending the attachment suit. The bonds therefore simply represented the property attached or the proceeds of the sale thereof, and they belonged to Weiss and not to the sheriff.

The sheriff was a mere stakeholder, and there existed no reason why he could not seize them as the property of Weiss, subject of course to the prior attachment. Nor did the suspensive appeal taken by Joseph Hoy & Co. from the judgment dissolving the attachment, prevent Eaton & Barstow from seizing the property attached.

The judgment of the district court dissolving the attachment having been affirmed on appeal, the attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure; and the proceeding by garnishment by Joseph Hoy & Co. against DeLacy, sheriff, after said seizure, did not affect it, or the rights of Eaton & Barstow under it; being *res inter alios acta*.

The right to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. have no right to do so.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment dissolving the injunction with ten per cent. on the amount of the judgment as general damages and one hundred dollars as attorney's fees, and for costs of both courts.

No. 3706.

PATRICK HALPIN v. JOHN L. BARRINGER—W. WOELPER, Garnishee.

The right of a garnishee to appeal for his own protection, has often been recognized by this court.

In this case of Halpin v. Barringer, judgment was rendered for plaintiff, and a *fi. fa.* having issued, Woelper was made garnishee. He answered that he had certain funds deposited in his hands, in a certain suit. Upon this answer, judgment was rendered against him. This judgment is wrong.

The judgment in the case in which Woelper was made garnishee, was against Barringer individually, in so far as the record discloses. The money in the hands of the garnishee belonged to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him, and the payment of such a judgment would not release the garnishee.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. R. Stewart Dennee*, for plaintiff and appellee. *O. E. Whitney*, for Woelper, garnishee and appellant.

ON MOTION TO DISMISS.

Howe, J. A motion to dismiss has been made, on the ground that the appellant, a garnishee, can not appeal. The right of a garnishee to appeal, for his own protection, has often been recognized by this court. 10 M. 568; 13 La. 570; 14 La. 511; 18 La. 405; *Semeritt v. McNamara*, Opinion Book, No. 37, p. 557; *State ex rel. Tureaud v.*

Halpin v. Barringer—Woelper, Garnishee.

Parish Judge, 23 An. 717. We are not prepared to say that in this case an appeal does not lie under the rule as first laid down in the case in 10 Martin. The case differs from Rochereau v. Guidry, this day decided. Motion overruled.

ON THE MERITS.

MORGAN, J. In the case of Halpin v. Barringer, judgment was rendered in favor of plaintiff.

Fi. fa. issued against Barringer, and Woelper was made garnishee.

He answers that as clerk of the Sixth District Court, he has in his possession and safe keeping, and subject to the order of the Sixth District Court, a check for eleven hundred dollars, which was deposited in the suit of McPhelin, administrator, v. John Maskew and als.

Upon this answer judgment was rendered against him. The judgment is wrong.

The judgment in the case in which he was made garnishee, was against Barringer, individually, in so far as the record discloses.

The money in Woelper's hands was money belonging to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him.

In his petition, praying for garnishee process, plaintiff alleges that the *fi. fa.* is issued commanding the sheriff to take into his possession the property, real and personal, of Barringer or the succession of McPhelin; but we find no judgment in the record against McPhelin, or the succession of which he seems to have been the administrator, or against his succession. McPhelin, or his succession, or the succession of which he is the administrator, is not responsible for a judgment rendered against Barringer individually, and payment of such a judgment would not release the garnishee.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, Woelper, as in case of nonsuit, plaintiff and appellee to pay the costs of this proceeding.

No. 4458.

CHAFFRAIX & AGAR v. CHRISTOPHER C. PACKARD et als.

On the thirtieth of April, 1870, the plaintiffs sold to the defendants the undivided half of a tract of land situated in the parish of Plaquemines, for a certain amount cash and the remainder in three joint promissory notes, due in one, two and three years, and secured by mortgage on the property sold. On the fifth of August, 1871, said property, at the suit of Chaffraix & Agar, was sold and adjudicated to pay the first of said promissory notes. On the second of September, 1872, the said Chaffraix & Agar obtained another order of seizure and sale predicated upon the same mortgage and one of the notes—the second installment of the mortgage debt—to sell the same property previously seized and sold under the first order of seizure and sale.

Packard, one of the purchasers, in 1870, by contract with the plaintiffs, and subsequently under the sheriff's sale, in 1871, of a portion of the mortgaged property which had been divided into lots, has arrested by injunction the sale ordered in 1872, on the following grounds: That the said property was sold and adjudicated on the fifth of August, 1871, in the undivided half of fifteen lots, by an order in the case of the plaintiffs, Chaffraix & Agar, against the same defendants, to satisfy the mortgagees' rights upon said lands *in toto*; that a sufficient amount of cash was required for the matured note and costs; that the balance of the lots were sold upon terms of payments to meet the *unmatured notes*; that the land of said plantation was now owned in separate lots by the persons to whom they were adjudicated at said sale; that by said sale all the mortgages and privileges followed the proceeds, and that the whole of said undivided half so sold was relieved therefrom; that said plantation was no longer the joint property of these defendants; that plaintiffs' rights sought to be enforced are extinguished; that this defendant having purchased and paid for certain distinct lots, is now the owner of the same, unincumbered, and the seizure and attempted sale of the alleged half of said tract is an unwarranted usurpation of his rights and will work him an irreparable injury.

These allegations do not warrant an injunction. They are inconsistent, and the legal deductions drawn from them are incorrect. The plaintiff in injunction first states that the sale on the fifth of August, 1871, was made for cash to pay the matured note, and avers that the balance of the lots were sold on credit to meet the notes not due, and yet he alleges that the sale extinguished the debt and mortgage upon the whole tract, and that he bought certain of the lots and paid for them in full, wherefore he claims to be the sole owner thereof with an unincumbered title and has the right to arrest the sale of the undivided half, although the other purchasers do not complain. The order of sale described by him and annexed to his petition did not authorize the sale of certain of the lots for all cash, and the balance of the lots all on credit, and such sale by the sheriff would be simply null. In the opinion of this court, defendant's allegations in this case, taken altogether and as true, do not show a sale that in the least affects plaintiffs' right to enforce the mortgage by which their notes are secured.

If the defendant Packard, bought two lots or the whole of the undivided half of the plantation, under the order of court and executory process on which he relies, he only acquired thereby the rights of himself and his co-debtors, and they had no rights under the law and their contract, which could impair the plaintiffs' right to have their unmatured notes paid according to their original contract for their payment.

Where the debtor and owner becomes the purchaser, the sale does not extinguish the debt and mortgage not actually paid by the proceeds of the sale—the debtor being bound by his contract and not being able to extinguish his debt except by payment according to his stipulations.

If Packard had bought the whole plantation and paid the debt *then due*, he and the land would have remained bound for the portion not due, and the holders of the notes representing such portion could proceed to enforce the payment thereof. The sheriff could have canceled the mortgage only to the extent of the debt actually paid. Packard can not be put in any better condition by being the purchaser of only a portion of the mortgaged property and paying, as he contends, the whole of his bid, which was more than his share of the debt as one of the three co-obligors.

A sale of mortgaged property for cash to pay the instalment due and on a credit to meet those not due, does not extinguish the mortgage as to the latter.

If, under the circumstances of the purchase, the defendant Packard has to pay more than his virile share, as he seems to fear, he may have recourse upon his co-obligors.

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APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J. Sambola & Duoros*, for plaintiffs and appellees. *Packard*, appellant, in *propria persona*.

HOWELL, J. On the twenty-fourth September, 1872, the plaintiffs, Chaffraix & Agar, caused executory process to issue against the three defendants and an undivided half of the Sarah plantation, sold by the former to the latter jointly, to be seized and advertised for sale, to pay a note due at two years from the date of sale, being the second of a series of three given by the purchasers and secured by mortgage on the property sold, and plaintiffs ask that the sale be made for cash and on credit, in accordance with their act of sale and mortgage. These notes were made jointly by the three purchasers, and indorsed by them. On the sixteenth of the next month, C. C. Packard, one of said purchasers and defendants, arrested the sale under article 739 C. P., alleging that "the said property was sold and adjudicated on the fifth August, 1871, in the undivided half of fifteen lots of ground," by an order in the case of Chaffraix & Agar against these defendants, to satisfy the mortgagees' rights upon said land *in toto*; that a sufficient amount of cash was required for the matured note and costs, "the balance of the lots (in the language of his petition) were sold upon terms of payments of *the unmatured notes*;" that the land of said plantation is now owned in separate lots by the persons to whom they were adjudicated at said sale; that by said sale all the mortgages and privileges followed the proceeds, and the whole of said undivided half so sold was relieved therefrom; that said plantation is no longer the joint property of these defendants; that plaintiffs' rights, sought to be enforced, are extinguished:

First—By the extinction of the thing, the plantation having been mortgaged in block, and sold in lots or parts under the constitution.

Second—By the extinction of the mortgagees' rights.

Third—By the extinction of the debt for which the mortgage was given.

Fourth—By mortgagees' relinquishment of mortgage which attached to proceeds of above mentioned sale, and the executory title against the joint defendants having also ceased with said sale, the plaintiffs are without right to proceed as they are attempting; that this defendant, having purchased and paid for certain distinct lots, is now sole owner of the same unencumbered, and the seizure and sale of the alleged half of said tract is an unwarranted usurpation of his rights and will work him an irreparable injury.

In our opinion these allegations do not warrant an injunction. They are inconsistent, and his legal deductions are incorrect. He first states that the sale on fifth August, 1871, was made for cash, to pay the ma-

tured note, and the balance of the lot on credit to meet those not then due, and yet he alleges that this sale extinguished this debt and mortgage upon the whole tract; and (though rather vaguely) that he bought certain of the lots and paid for them in full, and he is therefore the sole owner thereof, with an unencumbered title, and has a right to arrest the sale of the undivided half, although the other purchasers do not complain. The order of sale, described by him and annexed to his petition, did not authorize the sale of certain of the lots for all cash, and the balance of the lots all on credit, and any such sale by the sheriff would be simply null. In our opinion, his allegations, taken all together and as true, do not show a sale that in the least affects plaintiffs' right to enforce the mortgage by which their notes are secured.

But on the trial, he introduced evidence, by which, he contends, he has shown a sale by the sheriff and a purchase by himself of two of the lots, the price of which he paid in cash, and therefore the said lots are released from the mortgage, and it is suggested that the case be remanded for the sheriff to amend his return and for further proof.

No amount of evidence, in our opinion, could establish such a sale, under or by virtue of the order of court—the executory process—which was to sell for cash sufficient to pay the note due, and on such terms of credit as were granted to the debtors by the original contract, for the payment of the installments not then due, as prescribed by article 686 C. P. By article 690, the adjudication thus made has, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing adjudged.

If Mr. Packard bought two lots, or the whole of the undivided half under the above order, he only acquired thereby the rights of himself and his co-debtors, and they had no rights, under the law or their contract, which could impair the plaintiffs' right to have their unmatured notes paid according to the original contract for their payment. See 11 La. 70, *Rice v. Schmidt*.

In 9 La. 11, *ib.* 99, and 12 R. 206, the doctrine was announced that where the debtor and owner becomes the purchaser, the sale does not extinguish the debt and mortgage, not actually paid by the proceeds of the sale, the debtor being bound by his contract and not being able to extinguish his debt except by payment according to his stipulations.

In *Pepper v. Dunlap*, 16 La. 170, a leading case, it was held that property could be sold for cash to pay the note due and on credit to meet the unmatured notes according to the contract of mortgage; and in *Gallier v. Garcia*, 2 R. 319, commenting on this right the court refer

to the above case in 16 La., and say that in such a sale the sheriff could claim only the sum actually intended to be made, and state the assumpsit of the purchaser to pay the outstanding notes.

And this seems but justice; for any other course would place the holders of the notes for the unmatured installments, secured by the same mortgage, in a worse position than that given by articles 707, 708, and 709 C. P., to the holders of second or inferior mortgages.

Now, if Mr. Packard, being an owner and debtor, had bought the whole plantation and paid the debt then due, he and the land would have remained bound for the portion not due, and the holders of the notes representing such portion could, under articles 709 and 732 C. P., proceed to enforce the payment thereof. The sheriff according to the authorities already referred to, could have canceled the mortgage only to the extent of the debt actually paid.

And we can not see how he is placed in any better condition by being the purchaser of only a portion of the mortgaged property, and paying, as he contends, the whole of his bid, which, at most, only amounted to the sum actually due at the time, unless he alleges and shows that the plaintiffs agreed to release him and the portion of the land purchased by him, which he has not done.

The principle upon which the right of a mortgage creditor to sell for cash and on credit rests, is that every part of the property is mortgaged for the whole of the principal debt, and in the distribution of the proceeds of the pledge, the holders of the different installments of the same mortgage are entitled to participate. 1 R. 225. In this case the whole of the undivided half sold by the plaintiffs to defendants was affected by the mortgage, retained to secure each and all the notes given by the purchasers and co-proprietors. See 23 An. 411. The payment of one of the said notes did not release the mortgage as to the others. It follows then that Mr. Packard could not acquire a part of the property free from the mortgage securing the unpaid debt except upon a new and special agreement to that effect with the holders of such debt, which was not made; and as he does not pretend that the property did not sell for enough to meet the debt due and not due, thereby necessitating a pro rata reduction thereon, he can not, upon any hypothesis, claim that any portion of the mortgaged land is exempt from any part of the unpaid debt. If, under the circumstances, he has to pay more than his virile share, as he seems to fear, he may have recourse upon his co-obligors.

The error, as to him, is in supposing that a sale of mortgaged property for cash, to pay the installment due and on credit to meet those not due, extinguishes the mortgage as to the latter. We think the law and the jurisprudence of the State clearly maintain the contrary

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doctrine, and that the injunction was properly dissolved, and the plaintiffs allowed to proceed.

Judgment affirmed.

WYLY, J., *concurring in the decree*. The plaintiffs sued out an order of seizure and sale on the joint note of C. C. Packard, S. W. Sawyer and Mary A. Leonard, for \$2833 33, secured by a special mortgage on the undivided half of the "Sarah plantation," in the parish of Plaquemines. The defendant, Packard, enjoined the foreclosure of the said mortgage, although on his own showing he only owns one-third of the mortgaged premises.

The court dissolved the injunction and he has appealed.

It appears that Packard, Sawyer and Mrs. Leonard, on the sixteenth of April, 1870, bought from the plaintiffs the undivided half of a tract of land known as the "Sarah plantation," in the proportion of one undivided third each, for the price of \$18,000, \$10,000 thereof cash, and for the balance they executed to the plaintiffs their three joint notes for \$2833 33 each, due in one, two and three years. In the act of sale and mortgage we find the following clause: "And in order to secure the payment of said promissory notes in capital and all interest thereon as aforesaid, together with all said attorney's fees, special mortgage in favor of said vendors, and the future holder or holders of said notes, is hereby retained on the undivided half of said plantation or land herein conveyed, and the purchasers hereby bind themselves not to sell, alienate or encumber the same to the prejudice of this act."

Now the inquiry is, is this mortgage an indivisible obligation binding each and every acre of the mortgaged premises for the payment of the entire debt, interest and attorney's fees, or is it an obligation operating in shares, that is, binding the undivided share of each purchaser only for the portion of debt due by him as a maker of the three joint notes? In other words, suppose one of the purchasers in indivision should pay his part of the debt, as Packard claims to have done, would the mortgage continue on his undivided third of the mortgaged premises to secure the payment of the sums due by Sawyer and Mrs. Leonard?

Packard claims that he paid the first note which matured on the sixteenth of April, 1871, and that his co-obligors contributed no part to the payment of said joint note; that this payment not only released his personal obligation as joint maker of the other two notes for like amount, but it discharged the mortgage on his undivided share of the mortgaged premises.

The position is untenable, both in regard to the personal obligation and the mortgage.

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He was only bound to pay one-third of the first note; that was the extent of his personal obligation. The fact that he saw fit to go further and pay the amount due by his joint obligors on that note would not discharge his obligation on the other two notes, so far as the holders thereof are concerned. Such payment would subrogate him to the right of the payee against his co-obligors. It would in no manner discharge his obligation as joint maker of the other two notes of \$2,833 33 each, which had not yet matured. Now it is true one act may contain several sales and several distinct mortgages. And if the vendors and vendees in this case had so agreed, a deed and act of mortgage might have been drawn embracing three distinct sales and three distinct mortgages, wherein the plaintiffs would convey to each of the purchasers a separate quantity of land, and to secure the price thereof retain a special mortgage on that separate or distinct part of the land. In such an instrument there would be no joint obligation, as there is in the notes taken in this case, because there would be no *aggregatio mentium* between the purchasers; there would be no joint tie between them, so that if one should pay and the others did not, subrogation would arise by operation of law in favor of the one discharging the joint debt. Each having an independent contract with his vendors, would be bound by a separate obligation, and it would be impossible for the relation of joint obligors to exist between the purchasers. In such an instrument there would necessarily be three independent personal obligations and three distinct mortgages. Here, however, we have but one personal obligation and but one mortgage, to wit: the joint obligation of Packard, Sawyer and Mrs. Leonard, to pay the three notes of \$2833 33 each, and to secure these notes and all interest thereon and attorney's fees, a "special mortgage" is retained "on the undivided half of the plantation, or the property herein conveyed."

The property was sold in return for the joint consent or promise of the purchasers to pay the entire price, and a special mortgage was retained to secure the entire amount thereof. If one of the purchasers had signed the act and the other two had refused, can it be pretended that the sale would have been completed for any part of the land? Surely not. Because the essential element of consent would be lacking. The plaintiffs never agreed to sell part of the land in return for the promise of one of the purchasers. They only agreed to sell their entire interest in the "Sarah plantation" for the joint promise of the purchasers to pay the price, which was \$18,600—\$10,000 thereof cash, and the balance in three joint notes of \$2833 33 each.

In *Stewart, Hyde & Co. v. Madam Board*, 23 An. 411, where each of five heirs sold to their mother, the defendant, his share of his father's

estate, and in order to secure the debt to each heir she mortgaged the entire property; this court held that the rescission of the sale by four of the heirs did not remove the mortgage on the entire property to secure the notes given to the fifth heir. True it was that the act contained separate sales of the slaves of the five heirs, but only one mortgage was given in which the purchaser declared that "all the said property to be and remain specially mortgaged in favor of the payees of said notes or their assigns, until the full and complete payment of the same, principal and interest."

Here the purchasers signed the act in which it is declared that "in order to secure the payment of said promissory notes in capital and all interest thereon, together with all said attorney's fees, special mortgage in favor of said vendors, and the future holder or holders of said notes, is retained on the undivided half of said plantation, or the property herein conveyed."

So therefore, whether the act before us contains one sale to three joint purchasers, or three separate sales, is immaterial. Because there can be no doubt that it contains but one mortgage bearing on the whole property conveyed to pay each note, and all the interest and attorney's fees, stipulated to be paid in case it became necessary to resort to legal proceedings to collect the debt.

The note in suit has not been paid. It is secured by special mortgage on all the property conveyed by the plaintiffs to the three purchasers.

The next objection raised by the defendant in support of his injunction is, that all the mortgaged property was sold by the sheriff under the foreclosure of this mortgage on the first note; that he became the purchaser of an amount equal to his undivided third of said property, and having paid the price said property ceased to be encumbered with the unpaid installments of said mortgage, including the note now in suit. This proposition is unsound in law, and it is not borne out by the facts disclosed in the record.

It no where appears in the record that the defendant purchased any part of the property under a foreclosure of the mortgage on the first note.

If the defense were a good one, it certainly devolved on the defendant injoining the foreclosure of the mortgage herein, to establish with competent evidence the facts alleged, as the basis of said injunction. If the title, which he pretends to have acquired at the sale under the foreclosure on the first note exists, he should have offered in evidence the deed in support of the allegation. If the deed has been destroyed, the fact should be proved before secondary evidence of title to real estate can be received.

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Now, what is the evidence which the defendant adduces in support of his defense that he has acquired a new title to his part of the property under the foreclosure of this mortgage on the first note? He offers the writ of sale, commanding the sheriff to sell the mortgaged property for cash, sufficient to pay the amount of the first note, interest and costs, and also the amount of the attorney's fee, and the sale to be "on terms of credit corresponding with the terms of payment of the unmatured notes aforesaid." The note now in suit and the one due one year later are the unmatured notes referred to. Upon this writ there is the following return:

"Received June second, 1871, and executed the within writ by seizing and taking into my possession the Sarah plantation, advertising and selling the same, and return this writ upon the showing that the amount of the same has been paid and satisfied.

"Signed,

BART DAWNEY, Sheriff."

This return does not show that the sheriff observed the formalities required by law to make a forced sale; he can not certify his conclusion of law that a legal sale was made; his return must state the facts, in order that the court may determine whether or not there was a sale of the property. The return does not show that notice of seizure was served upon Packard, Sawyer and Mrs. Leonard, the joint owners of the property; it does not show when, how and where the advertisement was made; when, where and how the sale was made; whether the property was appraised; to whom it was adjudicated, and at what price; and whether the purchaser complied with the terms of adjudication. In the absence of any evidence of these essential requirements having been complied with, it would be impossible to conclude that there has been a legal sale under the writ which issued to the sheriff. A statement by the sheriff of his conclusion of law on the question, whether the property was sold under the writ or not, can not supply the deficiency in his return.

In order to show that he paid the amount due under that writ, the defendant adduced a receipt signed by E. Lawrence, which is as follows: "Received by direction and for account of Mr. L. Bayhi, sheriff, from Mr. C. C. Packard the sum of fifty-five hundred and ninety-one dollars and twenty-six cents on account of the two writs of seizure and sale of Chaffraix & Agar, and E. Lawrence, from the District Court, parish of Plaquemines, against the said C. C. Packard, et als., and attorney's fee and costs of court, and sheriff's fees, as per bill on the reverse of this paper."

The writ referred to in this receipt in favor of Lawrence, was a writ under a different mortgage and bearing on different property than that embraced in the mortgage now sought to be enforced.

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Assuming the correctness of the statement in this receipt signed by Lawrence (and of the truth thereof there is no evidence, because Lawrence not being the sheriff, did not seize it under oath), and what does it amount to? It only confirms the statement in the return, that the sheriff "returned this writ upon the showing that the amount of the same has been paid and satisfied." It does not prove that there was a sale according to law under the writ of the property; nor does it in any manner establish the defense that the defendant Packard acquired thereunder a new title to the property, conveyed by plaintiffs to him, Sawyer and Mrs. Leonard in indivision.

The defendant offered in evidence a letter from E. Lawrence to the sheriff which is as follows: "You will see by receipt given to Mr. C. C. Packard that he has paid for his proportion of the notes in suit by Chaffraix & Agar and myself, and also handed me the cash as per receipt given him for costs, etc. You will therefore please make out his title for the property purchased by him on the Sarah plantation."

Now the mortgage which Lawrence sought to foreclose rested on one-half of the Sarah plantation, and the mortgage of the plaintiffs rested on the other half thereof.

If this were a controversy in regard to the mortgage in favor of Lawrence as to the payment of the notes secured thereby, the letter would have been admissible. But Lawrence's letter is no evidence against plaintiffs in this suit. If he had sworn to the truth of the statements therein contained, it would not bind the plaintiffs; it would not be admissible, because it is the mere *ex parte* statements of a witness; the plaintiffs have not had an opportunity to cross examine. I think, therefore, that the judge did not err in refusing to admit the letter of Lawrence in evidence against the plaintiffs, and the bill of exceptions of the defendant was not well taken. The receipt and letter of Lawrence can not establish the allegation that Packard acquired a new title to the property under the foreclosure of the mortgage on the first note. If they could be regarded as proof on this point, they do not state the fact. Nor is it stated in the sheriff's return. If the sheriff's return is untrue, the defendant should have had it corrected so as to conform to the truth. He can not expect this court to presume from the unsworn statement of Lawrence, a stranger to this mortgage, that he (Packard) acquired the property at a sale on the first mortgage note.

But suppose he did buy in his part of the property on the pretended foreclosure of the mortgage note, would that be a good defense to this proceeding on the second note in the same mortgage? Would such purchase give him a new title to the property? I think not. The defendant really acquired nothing by the adjudication of his own property to himself on the mortgage note which he subscribed jointly with

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two others for the price of said property. Before the pretended forced sale he owned one-third of the property, and the plaintiffs were the authors of his title; after the pretended forced sale he was merely the owner of the same property, and the plaintiffs remained the authors of his title. The pretended sale resulted neither in a change of title nor a change of possession. The sheriff, as agent of the defendant, appointed by law to sell his property to pay his mortgage debt, offered the property for sale, and at the offering it was adjudicated to the owner or the person making the sale through the sheriff and the machinery of the law.

The defendant, to say the most, simply bid in his own property and paid the debt; there was no transfer of ownership and possession; there was no sale.

Taking the facts as we find them in the record, the position of the defendant in this case is utterly indefensible.

Being merely the owner of an undivided third of the mortgaged property he enjoins the plaintiffs from selling any part thereof, notwithstanding their mortgage importing a confession of judgment bears on all the property mentioned in the act to secure the payment of the notes, all the interest thereon and the attorney's fees.

It is not pretended that the note upon which this executory process issued has been paid, or that it is in any manner discharged. It is the joint obligation of the defendant and the two other purchasers. He is bound personally for one-third of the note, and the entire property is specially mortgaged to secure it.

I therefore concur in the decree in this case.

LUDELING, C. J., *dissenting*. On the thirtieth of April, 1870, Chaffraix & Agar sold to C. C. Packard, S. W. Sawyer and Mary A. Bouligny, wife of P. Leonard, the undivided half of a tract of land, situated in the parish of Plaquemines, in the proportion of one undivided third to each of the purchasers. The price stated is \$18,500—\$10,000 cash, and the remainder in the three joint promissory notes of the vendees, of \$2833 33 each, with eight per cent. interest from date, due in one, two and three years, and secured by a mortgage on the property sold.

On the thirty-first day of May, 1871, Chaffraix & Agar obtained an order of seizure and sale under said mortgage, against Packard, Sawyer and Leonard, to sell the property purchased by them to satisfy the notes above mentioned. Under the writ the property was seized and advertised, and the return of the sheriff on the writ, states that the property was sold and the writ satisfied, although it does not state to whom the property was sold and for what price.

On the twenty-first of September, 1872, the said Chaffraix & Agar obtained another order of seizure and sale, predicated upon the same mortgage and one of the notes, the second installment of the mortgage debt, to sell the same property previously seized and sold under the first order of seizure and sale.

On the twelfth day of October, 1872, Packard obtained an injunction to prevent the sale of his property, on various grounds, to wit: That a suit had been brought, on the mortgage debt, when the first of the series of notes had matured, and an order of seizure and sale had been obtained in May, 1871; that the property mortgaged had been surveyed and subdivided into fifteen separate lots, and sold in pursuance with the said order of sale for cash, to pay the matured note and all costs, and on terms of credit corresponding with the maturity of the notes not due; that by the partition of the land and sale in separate lots, the mortgage for the credit installments attached to the separate lots *pro rata*, and the old mortgage was extinguished; that at the sale of the lots in August, 1871, Packard bought two lots and paid the full price bid, and that said two lots are unencumbered by the mortgage now attempted to be enforced against them, and the seizure and sale thereof is unauthorized by law.

There was judgment dissolving the injunction, and the plaintiffs appealed.

On the trial the plaintiffs in injunction took two bills of exceptions. The first was to the reception of the act of mortgage, on the ground substantially that it was dead, the property mortgaged having previously been sold under an order of sale issued under said mortgage.

If the legal position stated in the objection be conceded, still that would be no reason for excluding the act of mortgage. In truth the evidence attempted to be excluded is necessary to enable the court to decide upon the merits of the pleas in the petition of injunction.

The second bill was to the ruling of the judge *a quo*, excluding, as irrelevant, a letter written by E. Lawrence to the sheriff of the parish of Plaquemines, who had made the sale under the writs. It is proper here to state that two writs or orders of seizure and sale had been issued against the property in question in favor of the vendors, E. Lawrence and Chaffraix & Agar, who had each sold to the vendees an undivided half of said Sarah plantation, and that E. Lawrence, the plaintiff in one of the suits, appears to have acted as the agent of the sheriff in making the settlement with Packard, after the sale of the property under the mortgage, and had received the payment of the price bid by Packard; and this letter was written to the sheriff after settlement with Packard. It is as follows:

" AUGUST 25, 1871.

"Mr. L. Bayhi, deputy sheriff, or B. Danno, sheriff:

"Dear Sir—You will see by receipt given to C. C. Packard, that he has paid for proportion of the notes in suit by Chaffraix & Agar and myself, and also handed me the cash as per receipt given him for costs, etc. You will, therefore, please make out his title for the property purchased by him on the Sarah plantation.

"E. LAWRENCE."

I think the letter should have been received as part of the *res gestas*. Greenl. E. 1 § 120.

On the merits three questions are presented for solution :

First—Does a sale under a mortgage extinguish that mortgage?

Second—Were the separate interests of the co-purchasers mortgaged to pay the proportions of the debts due by the others?

Third—If so, did the purchase by Packard of two of the lots, at a sale made under the mortgage, relieve the property thus bought, from the mortgage, after he complied with his bid?

I. It is well settled that a sale, under the mortgage, when one not the debtor buys, destroys the mortgage; and the mortgage follows the proceeds of the sale. If any part of the price was on a credit, the mortgage exists to secure the payment of the notes given for the price bid. The old debt is extinguished by the sale, and consequently the mortgage, its accessory, is also extinguished. 5 N. S. 149; 7 N. S. 479; 16 La. 161.

II. I am of opinion that the separate interest of Packard, in the lands purchased by himself, Sawyer and Leonard, was not mortgaged for his co-purchasers' portions of the price.

It has already been stated that Packard, Leonard and Sawyer bought an undivided half of the Sarah plantation, "in the proportion of one undivided third each," and "they acknowledged delivery of possession for themselves, their heirs and assigns, in the proportion of one undivided third each." They paid the cash installment, and gave their joint notes for the remainder of the price, which was secured by a mortgage, retained on the property sold.

From the care taken by the parties in the act of sale, to distinguish the proportion of interest bought by each, and in payment whereof they executed their joint notes, it appears that it was their intention to acquire such distinct parts of the property, and to mortgage such parts only for the proportion of the price thereof due by each—in the same manner as if they had purchased by separate acts of sale.

"Several obligations, although created by one act, have no other effect than the same obligations would have had if made by separate contracts." C. C. art. 2084; 15 La. 594. Neither solidarity nor securi-

tyship can be presumed. Therefore, if Packard has paid his proportion of the price to Chaffraix & Agar, they should not be presumed to sell his property for the debts of others.

III. But if it be conceded that the mortgage was given on the whole property as a security for the payment of the whole price, that the distinct portion of each buyer was mortgaged for the debt of his co-purchasers, still the sale to Packard, made by the sheriff under the mortgage, would relieve the lots bought by Packard from the mortgage, so far as the debts of his co-obligors are concerned; for as to those debts for which Packard is not personally bound, his land alone was debtor or security. When it was sold for those debts the obligation against the land had been satisfied. At that sale, *quoad* the debts due by his co-purchasers, Packard must be regarded as a third party, and when he paid the price bid by him he and his said lands were released from further liability under the mortgage.

The property having been subdivided and sold in separate lots, it seems that Packard bid over two-thirds of the appraisement of the property, and he paid the amount of his bid in cash, and this money was distributed *pro rata* among the mortgage creditors, Chaffraix & Agar receiving their proportion thereof. It is now contended that these lots thus sold under the mortgage to Packard may again be sold under the same mortgage to pay the second installment. This is clearly an error. The mortgage is indivisible—that is, the property mortgaged can not be sold for a part of the debt but must be sold for the whole debt, and the proceeds of the sale must be distributed equally on the several installments, whether due or not. If Packard paid cash instead of executing his note for the portion of the price going to the installment not then matured, and it was received by the holder of said note, he is discharged. Thus, if Packard has paid the third of the whole price of the original purchase—for which alone he was personally bound—he is discharged from personal liability. And if he has paid the amount of his bid, and the parties entitled to receive it have received the price, the land thus sold for the debts of others is free from the mortgage. The only inference to be drawn from the imperfect returns of the sheriff in the writs is that the whole Sarah plantation was sold; the returns on the writs state that “the property was sold and the writ returned, satisfied.” The writs commanded the sale of the whole property to pay the whole debt, and the law so directed. We can not presume that the sheriff disregarded the commands of the law and of the writs. It is said that Packard personally owes the proportions of each of the unpaid notes for which he bound himself, which it is supposed are unpaid. But it is an error to assume that any part of the original debt is due. From the returns the writs

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were satisfied by the sale of the Sarah plantation—therefore these notes were extinguished, and the purchasers who bought the thirteen other lots on a credit alone can be pursued for any portion of the price unpaid.

It seems that Packard only bought two of the fifteen lots into which the plantation was divided; and that he paid cash for the two lots, which was enough to satisfy the note due and all costs and attorney's fees; and as that seems to be the only money that was distributed among the creditors, as shown by the statement of E. Lawrence, it is fair to infer that the other thirteen lots were sold on a credit; and if the sale was thus made with the consent of the parties, the mortgagees can not disregard the sale, and seize and sell the second time the two lots bought and paid for by Packard. The evidence in the record preponderates in favor of the plaintiff. The defective returns of the sheriff should not prejudice the plaintiffs' rights. It is the adjudication, and not the sheriff's return so received, which confers title.

But I think the ends of justice will be subserved by remanding the case, to enable the parties to have the sheriff amend his returns on the orders of seizure and sale, by stating more fully what he did under them according to law, and to enable the parties to show all the facts in regard to the payments and settlements made by Packard.

I therefore dissent from the opinion of a majority of the court.

TALIAFERRO, J., concurring in the dissent of C. J. Ludeling.

No. 3062.

DELOP & CO. v. WINDSOR & RANDOLPH—S. H. KENNEDY & CO.
Intervenors.

The intervenors have not in this case, as consignees, acquired a superior right to the cotton shipped to them, because it was attached by plaintiffs before the bill of lading was delivered to said consignees.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it, because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

The position taken by the intervenors that they are the owners of the cotton and therefore entitled to its proceeds, contradicts their judicial admissions in their petition of intervention, and therefore can not be permitted.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. E. T. Merrick, Race & Foster*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for intervenors and appellants.

WYLY, J. On the fourteenth November, 1867, the plaintiffs sued the defendants for \$4811 42, and attached fifty bales of cotton on board the steamboat Grey Eagle, which cotton the defendants raised on their plantation in Washington county, Mississippi.

After the attachment was levied S. H. Kennedy & Co. intervened, claiming to be creditors of the defendants in the sum of \$3290, and asserting a privilege on said cotton, because their claim was for supplies and cash advanced to raise it, and also because it was consigned to them by the defendants.

The court gave judgment in favor of the plaintiffs for the amount of the net proceeds of said cotton, \$2427 77, and rejected the demand of the intervenors. The intervenors have appealed.

The cotton was shipped by the defendants from Washington county, Mississippi, to S. H. Kennedy & Co., and the attachment was levied before the bill of lading was delivered to the consignees. The letter advising of the shipment of the fifty bales by the Grey Eagle, was not received by the consignees until one day after the cotton had been attached. The letter advising of the shipment of forty-nine bales by the Henry Ames, on the first of November, 1867, was not notice of the shipment of fifty bales by the Grey Eagle, on the eleventh of November, 1867, whether the forty-nine bales intended to be shipped on the Henry Ames was a part of the shipment subsequently made on the Grey Eagle, or not. The intervenors, therefore, have not, as consignees, acquired a right superior to the plaintiffs, the attaching creditors. 15 An. 260; 3 R. 106, 276; 6 An. 444; 20 An. 564; Revised Code, 3247.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it; because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

They produce, however, a chattel mortgage which the defendants gave them in March, 1867, on all the mules, farming implements, and the crops to be grown on their plantation in Washington county, Mississippi, to secure an indebtedness of \$3000, for plantation supplies furnished and to be furnished by the intervenors to the defendants.

As a chattel mortgage is unknown to our law, it can not be enforced in this State. Movables are not susceptible of being mortgaged. Revised Code 3289. We are not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights ac-

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quired by attachment under our own laws. See the case of Hughes, Hyllestead & Co. v. Klingender Brothers, 14 An. 845, and authorities there cited.

But the intervenors contend that by the laws of Mississippi the legal title of the property vested in them by virtue of the chattle mortgage, and therefore, as owners, they are entitled to the cotton or its proceeds.

This position contradicts their judicial admissions in the petition of intervention. Setting up no claim to the ownership of the thing, they allege "that your petitioners are entitled to the possession of said cotton as commission merchants, agents and factors;" and claiming that the defendants are indebted to them \$3290, they pray judgment against the defendants for the amount "to be paid by lien and privilege out of the proceeds arising from the sale of said cotton." * *

The intervenors can not claim as owners of the thing, without contradicting their judicial admissions, which they can not do.

Our conclusion is that the judgment of the court below is correct.

Judgment affirmed.

Rehearing refused.

No. 5106.

SUCCESSION OF WILLIAM RICHARDSON—Opposition of ELIZABETH McQUEEN et al.

It is not necessary that the appellant should sign the appeal bond; but an appeal granted to Elizabeth McQueen and others can not be perfected by an appeal bond signed by M. McQueen, as principal, and C. B. Austin, as security. The surety of M. McQueen can not be regarded as the surety of Elizabeth McQueen.

APPEAL from the Parish Court, parish of East Feliciana. *Haralson, J. Wickliffe, Fisher & Leake*, for administrator and appellee. *Adams, Kernon & Lyons*, for opponents and appellants.

WILT, J. The motion to dismiss this appeal because the opponents, who are the appellants, have not given bond, must prevail. The only bond we find in the record is subscribed by M. McQueen, as principal, and Charles B. Austin, as security.

It is not necessary that the appellant should sign the appeal bond; but an appeal granted to Elizabeth McQueen and others can not be perfected by an appeal bond signed by M. McQueen, as principal, and Charles B. Austin, as security. The surety of M. McQueen can not be regarded as the surety of Elizabeth McQueen.

It is therefore ordered that the appeal herein be dismissed at the costs of the appellants.

No. 5035.

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W. J. S. JOHNSON v. J. C. DUNBAR, Administrator. J. C. DUNBAR v.
W. J. S. JOHNSON—Consolidated.

To the demand of Dunbar individually against Johnson on a promissory note given for mules, which the former sold to the latter, the defense is the plea of eviction. Johnson acquiring the mules from Dunbar individually permitted them to be sold, without resistance, for a certain tax due by the succession of one Crouch, of which Dunbar was administrator, and repurchased the same at that sale. That this change of title in his hands amounted to an eviction constituting a valid defense to the payment of the note he gave Dunbar individually for the price of the mules, is hardly worthy of consideration.

Where in regard to a price of land belonging to the succession of Crouch, bought by Johnson at a sale by the revenue tax collector of the United States, it was contended that the administrator of said succession could not disregard Johnson's title and attack it collaterally by proceeding to sell the said land under order of the probate court;

Held—That the pretended sale consisted in a mere notarial conveyance, without an offering and an adjudication, made twenty-five miles from the place where the distraining was effected; that such a conveyance was an absolute nullity, and that the administrator of the succession was not bound to bring a direct action to have the nullity thereof pronounced.

The bill of exceptions to the ruling of the court *a qua*, admitting proof to show the fact that there was no adjudication of the property to Johnson by the tax collector, was not well taken. There was actually no sale, and the administrator was not bound to tender to Johnson the price of the pretended sale.

Besides, the next year after the acquisition of his pretended title, Johnson rented the land in controversy from the administrator of the succession—thereby, in effect, conceding his want of title and acknowledging that of his adversary.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. J. Bowman*, for Johnson. *Manning*, for Dunbar and the succession of Crouch.

WYLY, J. J. C. Dunbar, administrator of the succession of Winder Crouch, advertised for sale, under an order of the parish court, all the lands belonging to said succession.

W. J. S. Johnson claiming to be the owner by purchase from the United States revenue tax collector of one hundred and forty-seven acres of said lands, enjoined the sale thereof, alleging that he bought said land at public sale made to collect "the revenue tax due by the succession of Crouch to the United States, amounting to nineteen hundred dollars, sixteen hundred dollars of which was paid by him as purchase price of said land, and which inured to the benefit of said estate."

This is the first suit. The second suit is the demand of Dunbar individually against Johnson on a promissory note for seven hundred dollars for mules which he sold him. The defense to which is eviction, that the mules were sold also to him by the revenue tax collector for the tax due by the succession of Crouch. That Johnson acquiring the mules from Dunbar individually, permitted them to be sold, without resistance, for the tax due by the succession of Crouch and purchased the same, and that this change of title in his hands amounted to

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an eviction constituting a valid defense to the note he gave Dunbar for the price of the mules, is a defense hardly worthy of the serious consideration of this court. Johnson could certainly have successfully resisted the sale of his property for debt of the succession. The defense is manifestly baseless.

In regard to the land, it is contended by Johnson that the administrator of the succession of Crouch can not disregard his title and attack it collaterally by proceeding to sell the same under order of the probate court. In reply to this objection it is urged that the pretended sale by the revenue tax collector was an absolute nullity, because there was no offering and adjudication of the land, and that the mere naked transfer by the notarial act from the tax collector to Johnson at Alexandria, twenty-five miles from where the property is situated, did not convey the semblance of a title to him. Advertisement, an offering, and an adjudication are, of course, essential to make a forced sale, and the act of Congress requires that "the place proposed for sale shall not be more than five miles distant from the place of making the distraint."

In the case at bar the pretended sale consisted in a mere notarial¹ conveyance, without an offering and an adjudication, made twenty-five miles from the place of distraint. Such a conveyance was an absolute nullity; and the administrator of the succession of Crouch was not bound to bring a direct action in order to have the nullity thereof pronounced. Where there were an offering and an adjudication, the forced sale can not be attacked collaterally on account of informalities in the proceeding amounting to a relative nullity. It is the adjudication that transfers the ownership; and when Johnson opposed his title to the proceeding of the administrator of the succession of Crouch, it was competent for the latter to show as a fact that there was no adjudication by the tax collector to him of the property; and therefore there was no sale. The bill of exceptions taken to the ruling of the court admitting the proof to show the fact, was not, therefore, well taken; there was in fact no sale, and the administrator was not bound to tender to Johnson the price of the pretended sale.

Besides, the next year after the acquisition of his pretended title, Johnson rented the land in controversy from the administrator of the succession of Crouch, thereby, in effect, conceding his want of title and acknowledging that of his adversary.

It is therefore ordered that the judgment herein perpetuating the injunction of Johnson, and rejecting the demand of Dunbar on the note, be annulled, and it is further ordered that said injunction be dissolved with costs and that the administrator of the succession of

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Winder Crouch recover from W. J. S. Johnson two hundred dollars damages (attorneys' fees) for the illegal injunction herein; it is further ordered that John C. Dunbar recover of W. J. S. Johnson seven hundred dollars with five per cent. per annum thereon from the first day of January, 1873, and costs of both courts.

LUDELING, C. J. *dissenting.*

Rehearing refused.

No. 4976.

MRS. ANNE FORD v. MRS. ANNE KITTREDGE, Administratrix.

The creditor of a succession can call upon the courts of competent jurisdiction to see that the administration thereof be properly conducted.

This court sees no warrant in the law of Louisiana for answering in the affirmative the following questions: If a wife sue her husband for a separation from bed and board and a dissolution of the community which existed between them, and judgment is pronounced in her favor, dissolving the community; and if, after living apart for several years, and no judgment of divorce has been pronounced between them, they become reconciled, does reconciliation wipe out the judgment of separation and replace the parties in the same position they were in before it was rendered? Does property acquired by either of the spouses between the time the judgment was rendered and the reconciliation fall into the community?

There is no article in the Louisiana Code which corresponds with the article 1451 of the Code Napoleon. It was the law of France, even before the adoption of that code, that a community which had been dissolved might be re-established. Here there is no such law.

The administratrix, in this case, has not filed an account of her administration within a twelvemonth. The law makes this her duty, for the non-performance of which, the penalty is dismissal from office.

APPEAL from the Parish Court, parish of Assumption. *Tete, J. Le Blanc & Walter Guion*, for plaintiff and appellant. *Nichols & Folse*, for defendant and appellee.

MORGAN, J. In 1855, plaintiff instituted suit, in which she prayed to be separated from bed and board from her husband, and also for a dissolving of the community. The same judgment which pronounced the separation dissolved the community of acquets and gains which had existed between them, and reserved the question of the settlement of the community for a future occasion. Subsequently, by agreement between the parties, plaintiff's rights in the community were fixed at ten thousand dollars, for which judgment was rendered in her favor. Up to and including the year 1860, she received \$1000 per annum from her husband as interest on this judgment. She then received £30, £100, and in 1864 £1000. Shortly after the judgment of separation, she went to Ireland, where she taught school, realizing therefrom more than £1200. She received £50 from some friends in Ireland. She sold the good will of her school and her furniture for £150. Her funds were increased by the rise in consols, in which she had invested.

Ford v. Kittredge, Administratrix.

She left Ireland in 1866, taking with her eleven or twelve thousand dollars, and left in the bank in Dublin £1200. In 1866, she applied to her husband (from whom she was still separated) to invest her means for her, which he told her he could do, with Dr. E. E. Kittredge's name as security. She sent to Ireland for her £1200, which came to her in a sterling bill of exchange. This bill was sent to her merchants here, who sold the same for about \$8000. The proceeds were given by the merchants to her husband.

She claims to be the owner of a note which reads as follows:

"ASSUMPTION, La., June 7, 1867.

"\$8000. On the first day of January, 1869, we or either of us promise to pay to our order at the office of the recorder of this parish, the sum of eight thousand dollars, value received, with interest at the rate of eight per cent. per annum from maturity till paid.

"Signed,

"F. W. PIKE,

"E. E. KITTREDGE."

The note is indorsed in blank by the makers. Plaintiff says it belongs to her.

No proceedings were ever taken to convert the judgment of separation into a divorce, and in May, 1868, thirteen years after it was rendered, plaintiff and her husband became reconciled, and are now living together as man and wife. E. E. Kittredge died. His succession was opened. His widow was appointed administratrix thereof.

This suit is instituted by Mrs. Ford, for the sole purpose of having Mrs. Kittredge destituted from her trust as administratrix, for maladministration and failure to perform her duties. In this she is joined by her husband. The petition reads "The petition of Mrs. Anne Ford, wife, duly separated in property, and from bed and board from her husband Joseph D. Ford, and of said Ford, etc."

The allegation that she is separated from bed and board is not correct, inasmuch as she was living with him when this suit was instituted. Whether she is or not separate in property from him, or whether she was so or not when the rights which she is now asserting were acquired, is another matter which will be presently inquired into.

It is admitted by counsel in their brief "that it is necessary that plaintiff be a creditor of the succession of Dr. Kittredge, in order that she be permitted to interfere with its administration." The first exception which the defendant pleads to the action is that neither Mrs. Ford nor her husband are creditors of the succession.

We have copied the instrument which the plaintiff says is the evidence of her debt. In the record we find the following document:

"Parish of Assumption, La., June 2, 1871. I hereby acknowledge and recognize the annexed promissory note for eight thousand dollars

Ford v. Kittredge, Administratrix.

(\$8000) drawn by Dr. E. E. Kittredge and Francis W. Pike, jointly and severally to their own order and by them indorsed in blank, of which Mrs. Anne Ford is the present holder, to be a just and valid claim against the succession of Dr. E. E. Kittredge, to be paid in due course of administration."

(Signed)

ANNE E. KITTREDGE, Administratrix.

This, it seems to us, is the liquidation and acknowledgment of the claim, in conformity with the provisions of the 985th article of the Code of Practice. But she says that when this acknowledgment was made she was ignorant of the fact that the succession of Kittredge had been discharged from responsibility thereon. She says it was discharged because Kittredge was only Pike's security, and that as time had been given to Pike without Kittredge's consent, he is discharged. Pike says that Kittredge was only his security. As between Pike and Kittredge this may be true, although it would be difficult to make out of the document which we have copied above, a contract of suretyship. It seems to us to be a simple promissory note made by two parties who bound themselves towards the world as debtors for the whole amount stipulated therein. Be this as it may, the note was handed to Dr. Ford by Pike, and nothing in his testimony shows that Ford considered it as anything more or less than a promissory note, drawn by two persons, both of whom were liable for the full amount thereof. The time given to Pike, when the note fell due, consists in postponing payment for a certain time upon Pike's paying the interest.

On the thirteenth of July, 1870, the defendant instituted suit against Pike, claiming from him \$8000 upon the ground that the note in question was a mere matter of suretyship as between Pike and Kittredge, alleging that the note was then in the hands of Dr. Ford, as the agent of his wife, who was demanding payment thereof. The acknowledgment of indebtedness on the back of the note was made nearly a year after this suit against Pike was instituted. What became of the suit does not appear.

Under these circumstances it appears to us that as between plaintiff and defendant, plaintiff does show an indebtedness on the part of the succession of Kittredge, and it follows that as a creditor she can call upon the courts to see that the administration thereof is properly conducted.

But the defendant contends further that Mrs. Ford is not the owner of the note. She says that it belongs to Dr. Ford. She contends that the judgment dissolving the community between plaintiff and her husband was a mere incident to the judgment of separation from bed and board; that in that judgment she made claim to the restitution of no dotal or paraphernal funds—that she claimed, with regard to

property, nothing but a settlement of the community—and that inasmuch as a reconciliation has taken place between her husband and herself, the judgment of separation from bed and board and the judgment dissolving the community, became *ipso facto* null and void, and that they were, by the reconciliation, replaced in the same situation in which they were prior to the institution of the proceedings which resulted in a separation from bed and board and a dissolution of the community.

Thus this question is now for the first time presented for solution, viz: If a wife sue her husband for separation from bed and board and a dissolution of the community which existed between them, and judgment is pronounced in her favor, and dissolving the community, and if, after being apart for several years, and no judgment of divorce has been pronounced between them, they become reconciled, does the reconciliation wipe out the judgment of separation and replace the parties in the position they were in before it was rendered? Does property acquired by either of the spouses between the time the judgment was rendered and the reconciliation fall into the community? We see no warrant in the law of Louisiana for answering these questions in the affirmative.

Counsel for appellee say that these questions have been frequently passed upon in France, and he cites Troplong, *Contrat du Mariage*, vol. 2, No. 1466, who says that according to the contract law of France reconciliation is sufficient to efface the separation. "Therefore, as a general rule, separation of property which resulted from a separation from bed and board, ceased by the fact of reconciliation, without publication, without a public act, without any express declaration."

Marcadé, vol. 5, p. 588, sec. 2, goes, perhaps, further. He says: "Les effets de la communauté ainsi rétablie remontent au jour même du mariage, en sorte que, sauf l'exception ci-après, les époux sont réputés n'avoir jamais cessé d'être communs en biens. Ainsi, les biens qu'ils ont pu acheter pendant la séparation, aujourd'hui non avenue, et qui seraient entrés dans la communauté, appartiennent à cette communauté, et les successions ou donations mobilières qui leur sont arrivées y tombent également. * * * En un mot, la communauté est réputée avoir toujours duré; seulement, les actes valablement faits par la femme, qui durant la communauté n'auraient pu émaner que du mari, conservent la même efficacité que s'ils avaient été faits par lui * * * Que si cette portion de la fortune mobilière a été employée par la femme à l'acquisition d'un immeuble, cet immeuble devient un conquêt, comme si, la communauté durant, il avait été acheté par le mari au moyen du capital que la femme y a employé." Durranton expresses similar views.

But these authors, in the extracts which we have quoted, are commenting upon the article 1451 of the Code Napoleon, which provides that the community which is dissolved by the separation from bed and board, or simply of property, may be re-established by the consent of the parties; it can not be except by an act passed before a notary. In this case, the re-established community retroacts to the day of marriage; things are placed in the condition that they would have been if there had been no separation. But there is no article in the Louisiana code which corresponds with the article 1451 of the Code Napoleon. Mr. Troplong, in commenting upon the second paragraph of this article (which provides that the consent of the parties must be evidenced by an act passed before a notary public), says that, by the ancient law of France, this formality was not necessary. Still it was the law of France, even before the adoption of the code, that a community which had been dissolved might be re-established. Here there is no such law, and we do not think that we can make one.

Having found that the plaintiff was separated in property from her husband; that the note which is the basis of her claim is her property, and that it is a debt due by the succession of Kittredge, we have now to decide whether the defendant should be deprived of her trust as administratrix thereof.

She has not filed an account of her administration within a twelve-month. The law makes this her duty, for the nonperformance of which the penalty is dismissal from office. R. S. sec. 9.

She contends that she has no account to render to any one, as she has had no funds in her hands since her last account. Admitting this proposition to be true, which, however, it is not necessary for us to decide, and with reference to which we express no opinion, still the record satisfies us that if she has no funds in hand, it is because she has not properly discharged the duties of her office. The largest portion of the estate upon which she is now administering has been sold, and at the sale she purchased largely. The sale was effected in a partition suit, without objection from her. Such a proceeding, if permissible, can not certainly prejudice creditors. The sale, however, was made and the amount of her bid must be in her hands. The circumstances under which the property was sold rendered it only the more necessary that she should have filed an account in accordance with the law. The opinion to which we have arrived, renders it unnecessary that we should pass upon plaintiff's bills of exceptions.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the defendant be removed from the office of administratrix of the estate of her late husband E. E. Kittredge, the defendant to pay the costs in both courts.

Rehearing refused.

Succession of Thomas Hale.

No. 4636.

SUCCESSION OF THOMAS HALE—On opposition to account of Executrix.

It is sufficiently clear from the tenor of the will on record, that the testator had the desire to give the seisin to the executrix. Any disposition or recommendation from the testator to his executor in regard to the mode in which his property is to be administered is a sufficient indication of his desire to grant the seisin. It is not necessary that the word seisin be inserted in the will to confer the power.

The executrix is entitled to credit for interest paid to procure extensions of mortgage notes, it not being shown that she had moneys in hand sufficient for the purpose of taking up the notes of the deceased when the renewals were made. It was important to the interest of the estate that they should be taken up.

The sum of \$21,500 reported by the auditor in this instance, as amount of sales of property of the separate estate of the deceased during his last marriage and charged against his widow, was properly rejected by the court below, as there is no evidence to show that the proceeds of that property inured to the benefit of the community.

It is expressly announced by article 1749 of the Civil Code that "all donations made between married persons, during marriage; though termed *inter vivos*, shall always be revocable." The restoration by the wife to the husband of the various articles donated to her and the subsequent conversion of them by him for the uses and benefit of the community may be regarded as a revocation or an annulment of the donation.

Apart from the disability of the husband and wife to enter into a contract with each other, except when the law expressly permits it, the promise or engagement of the husband to return to his wife the value of the articles donated back to him, by replacing them with others of the same kind and of the like value, could only be regarded as an imperfect obligation at best, and one that can not be enforced by law. It did not have the binding force of a legal obligation against the husband and neither can it have against his heirs.

A donation made in money, in the form of the manual gift, is valid without the formality of a notarial act of transfer.

There is no foundation for the assertion that the provisions of article 1749 apply to donations by public act and not to manual gifts which require no formalities after delivery. This court is unable to discover in our code any exception to the rule laid down in article 1749.

It is contended that, if by the act of donation from the husband, the money became hers absolutely, then by operation of law, article 1753 of the Civil Code, the ownership of said money changed, and was vested in the heirs in consequence of the wife's second marriage. The court thinks that articles 1746, 1750 and 1752 must be construed together with article 1753, to which latter article the three former ones are subordinated, and that their operation is contingent upon the conditions expressed in the article 1753, which is not found in the Napoleon Code, but which was incorporated into our system of laws from the Roman law and Spanish Codes.

The attitude of the parties to this litigation would seem to present a case provided for by the article 1753 of our code. During the marriage large and valuable donations were made by the husband to the wife in the form of the manual gift. The husband died, leaving children by his marriage with the donee, who has contracted a second marriage, the children of the donor still living. But in this case the conclusion of the court is that the provisions of article 1753 can not be enforced, for the reason that the substance of the donation is no longer tangible nor susceptible of identification. The property, of which the ownership, under such circumstances, becomes vested in the children, must be the same property that was donated to the wife by the husband during the marriage. In this case, the money constituting the particular donation under consideration, has long since been used by the executrix, the donee, for the benefit of herself and family. It is no longer in esse as to the rights of the opponents. The ownership of it can not be enjoyed by the children nor the usufruct of it by the mother. Hence the executrix can not be held liable for it.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Labatt & Aroni*, for executrix and appellee. *Alfred Grima, John A. Gilmore, Clarke, Bayne & Renshaw*, for appellees, heirs of Thomas Hale.

26	195
47	730
47	734
<hr/>	
26	195
49	167
26	195
116	845

TALIAFERRO, J. The widow and executrix of the decedent, filed a provisional account of her administration on the first of July 1870. A vigorous opposition was made to it by the heirs of the deceased, who are the children of the executrix; one of them, a married woman of the age of majority, the others, minors represented by their tutor. The objections set up against the account are very numerous, and a complicated litigation arose. The investigation involved the examination of accounts and settlements of some intricacy, and the subject matter of the opposition was referred to an auditor. A large mass of evidence was taken before him, and his report, when presented to the Court, was in part rejected, while other portions of it were approved, and to the extent of the approval, became the basis of the judgment of the court. The opponents appealed. The executrix, in answer to the appeal, prays for various amendments of the judgment of the court *a qua*.

A supplemental provisional account was filed by the executrix on seventh January, 1873. This was opposed by the heirs likewise; but the opposition was overruled by the court and the opponents seem to have acquiesced.

Thomas Hale, whose succession forms the subject of this controversy, was twice married. He left descendants only by the last marriage. He left a will couched in the following terms:

"This is my last olographic will. I, Thomas Hale, of the City of New Orleans, do hereby make this my last olographic will and testament, desirous that my heirs may avoid the annoyances of judicial intervention. I do desire that an inventory be taken of all my property real and personal, immediately after my decease; that no sale or transfer be made thereof; that it remain undivided for the uses and benefit of my family during the life-time of my beloved wife Josephine Jones, and in case of her death before the majority of all my children, that no division thereof be made until the majority of the youngest of my children."

"Having been possessed of property at the time of my marriage with my present wife, Josephine Jones, and no inventory thereof existing, and having made no marriage contract or dower in her favor, and in order to avoid all differences of opinion and litigation that might arise as to the value thereof, it has been verbally agreed between my wife and myself that I would bequeath her one fifth of all my property, which I do hereby, subject to her relinquishment of any legal claim she would have upon the property acquired after her marriage; but in case of any change of opinion by her or her heirs respecting the relinquishment aforesaid, then her claim to the community property can be ascertained by reference to an act passed before F. Grima, notary in

Succession of Thomas Hale.

the year 1838, when I married my first wife, and the aforesaid fifth portion is null and void."

I give and bequeath unto the Boys' Male Orphan Asylum of this City (St. Mary), my dwelling house and premises at the Bay of St. Louis, State of Mississippi, and in case said property be sold or alienated before my death, then there shall be paid annually unto the trustees of said Asylum one thousand dollars for the term of five years after my decease, say \$5000 in all. I bequeath the remainder of all my property after the aforesaid bequests be provided for, unto my lawful children then living at the time of the division of my property aforesaid, directed to be equally divided among them.

I do hereby appoint my wife Josephine Jones the natural tutrix and executrix under this will, relying on her good judgment and discretion in the administration for the benefit of herself and children. I do further appoint, as under tutors for my children, Thomas Gilmore and Patrick Irwin, both of this city, entertaining the highest regard for their honor and integrity. Signed, written and dated of my own hand, in the sixty-eighth year of my age, in good health and sound memory, this fourteenth day of November, in the year of our Lord 1865.

Signed,

THOMAS HALE.

Ne variatur. New Orleans, June 13, 1867.

Signed,

J. W. THOMAS, Judge.

On the twenty-sixth November, 1866, the testator, then at Paris, in France, where he died a few months afterwards, added a codicil by which he revoked the donation of property at the Bay of St. Louis, substituting the donation of \$5000 in money payable annually in installments of \$1000 each, and confirming in all other respects his will as at first written. The surviving spouse rejected the legacy and stood upon her rights as survivor in community.

In viewing the action of the court below in regard to the contestation that has arisen in the settlement of this succession, it will be proper to follow up the separate grounds of the opposition in the order in which we find them set out in the reasons of the judge *a quo* for the judgment rendered.

First—The commission of Hyland for the collection of the rents of houses, amounting to \$8032 75, is opposed for the reason that no contract existed between Hyland and the deceased for the collection of these rents, during his lifetime and while in Europe; and that the executrix had no right to employ Hyland as collector at the expense of the succession. This objection was overruled. The deceased recommended his wife, executrix of his will, to retain the services of

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Hyland in the settlement of his succession, and Hyland should not be considered merely as an ordinary agent.

Second—The heirs oppose the commission of the executrix on the ground that she had not the seizin of the property by the will. It appears, said the court, that it is sufficiently clear, from the tenor of the will, that the testator had the desire to give the seizin to the executrix. Any disposition or recommendation from the testator to his executor in regard to the mode in which his property is administered, is a sufficient indication of his desire to grant the seizin. That it is not necessary that the word seizin be inserted in the will to confer the power. This objection was overruled.

Third—Opposition is made to the payment of interest on renewal of notes as charged in the auditor's report, on the ground that the revenues of the estate were sufficient under a proper administration of the estate to satisfy the claims upon which interest has been paid. This objection was sustained.

Fourth—Opposition is made to the auditor's report in relation to the separate estate of Thomas Hale before his second marriage, the opponents claiming a larger amount of the property than is allowed in the report. The auditor's report on this subject is sustained, except, however, the item of \$21,500, amount of sale of two pieces of property sold by Thomas Hale during his second marriage.

Fifth—The heirs opposed the claim of the widow and executrix for \$20,472 50, on the ground that this sum was the amount of donations made from time to time by Thomas Hale to his wife, which donations they contend were revoked by the donor. The auditor in his report rejected this claim, but the court overruled, as to this item, the auditor's report as well as the opposition of the heirs.

Sixth—The auditor's report is opposed by the executrix as to his rejection of her claim for \$28,000, proceeds of a bill of exchange donated to his wife by the deceased in the form of a manual gift. The rejection of this claim by the auditor is sustained by the court, on the ground that a bill of exchange is an incorporeal right, and could only be transferred by donation by an act passed before a notary and two witnesses.

Seventh—The usufruct of the community property allowed to the widow by the auditor is opposed by the heirs, on the ground that the testator has disposed of his property by will. The court sustained the auditor's report and overruled the opposition of the heirs.

Eighth—The court passed upon the two items of the accounts not reported on by the auditor, one for 21,000, the other \$6000, charged as community funds used in improving the separate property of Hale. The court concluded from the evidence, that at the time of the disso-

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lation of the marriage, the increased value of the lots on Magazine street from the expenditure of community property in improving them amounted to \$10,000, and that of the lots on Julia street to \$4000, making \$14,000, and reduced the charge to that sum.

We concur with the judge *a quo* in his ruling in regard to the preceding items under the numbers 1, 2, 4 and 8. We dissent from his disposal of the items 3, 5 and 7.

The item 3—We think the executrix entitled to credit for interest paid to procure extensions of mortgage notes, it not being shown that she had revenues in hand sufficient for the purpose of taking up the notes when the renewals were made, and it was important to the interest of the estate that they should be taken up.

The item 4—The sum of \$21,500 reported by the auditor, amount sales of property of his separate estate during his last marriage and charged against the widow, was properly rejected by the court, as there is no evidence to show that the proceeds of that property inured to the benefit of the community.

Item 5—The claim set up by the executrix to be reimbursed the sum of \$20,472, is founded upon the promise of Thomas Hale to furnish her with jewelry and other valuables to that amount, in lieu of property of that kind previously given to her, which was sold and the money appropriated to his use. The testator was possessed of an ample fortune. He owned in New Orleans at the time of his second marriage a large amount of real estate, the rental of which formed perhaps the greater part of his income. He was at one time, in connection with others, engaged in large mercantile operations in Mexico. He lived in a style commensurate with his abundant means. From time to time during his last marriage he made donations to his wife of the character and in the form of manual gifts. These consisted of money and objects of elegance and taste, as costly paintings, statuary, jewelry and silver ware. At one time, from the casualties of trade he found himself temporarily embarrassed and heavily pressed for money to meet his engagements and to sustain his credit. In this emergency his wife willingly and promptly parted with the valuable presents received from her husband to be converted into money for his relief. It is shown to have been the purpose of Mr. Hale to compensate his wife for this sacrifice by bestowing upon her other articles of the same kind and like value to be selected by her in Europe during their last trip to that continent. His death, it seems, frustrated this purpose. Soon after their arrival in Europe he was taken sick and died, as we have seen early in the year 1867. In allowing this claim we think the court erred. It is expressly announced by article 1749 of the Civil Code, that "all donations made between married persons during marriage, though termed *inter vivos*, shall always be revocable."

The restoration by the wife to her husband of the various articles donated to her and the subsequent conversion of them by him for the uses and benefit of the community, may be regarded as a revocation or an annulment of the donation. But it is contended that there was no revocation of the donation, as it was the purpose and intention of the donor to reinstate to his wife the value of the articles donated, in others of the same kind and of like value; that he had promised so to do and was prevented alone by death from fulfilling this engagement; that his succession is bound to fulfill it. Apart from the disability of the husband and wife to enter into a contract with each other, except where the law expressly permits it, the promise or engagement insisted upon could only be regarded as an imperfect obligation at best, and one that can not be enforced by law. It did not have the binding force of a legal obligation against the husband and neither can it have against his heirs. The opposition to this claim must be sustained and the claim rejected.

Sixth—The rejection by the auditor of the claim of the executrix against the succession, of \$28,000. The court sustained the rejection on the same ground that the auditor did; that the donation consisted of a bill of exchange for that sum, and the bill of exchange being an incorporeal right could only have been donated by act before a notary and two witnesses. Civil Code art. 1536. There is much said in the voluminous testimony of this large record in reference to the giving of this sum of \$28,000. We conclude from the evidence that the proceeds of a bill or bills of exchange were given, and not the bill itself. The testimony of the sister of the executrix is positive on the subject, and her statement is corroborated by other testimony. She states that Mr. Hale handed to her a package containing twenty-eight United States Treasury notes, of one thousand dollars each, which he declared to be Mrs. Hale's money, and which witness delivered to her. We think the evidence establishes that the donation was made in money, in the form of the manual gift, and that a notarial act of transfer was not requisite to its validity. Civil Code, art. 1539.

On the part of the heirs it is contended that these funds belonged to the community, and they require the executrix to bring them back as assets of the succession. They moreover hold that if, by the act of donation, the money became hers absolutely, then, by operation of law, the ownership of it changed, and was vested in the heirs; this change resulting from her second marriage. Civil Code, article 1753. This article reads: "If a person who marries a second time, has children of his or her preceding marriage, he or she can not, in any manner, dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or

 Succession of Thomas Hale.

sister of any of the children which may remain. This property becomes by the second marriage, the property of the children of the preceding marriage, and the spouse who marries again, only has the usufruct of it."

The counsel for the executrix maintains that the provisions of article 1749 apply to donations by public act and not to manual gifts which require no formalities after delivery, and he quotes several French authorities. We are unable to discover in our code any exception to the rule laid down in article 1749 declaring that "all donations between married persons during marriage shall always be revocable." The articles 1746, 1750 and 1752 must be construed together with article 1753, to which latter article the three former ones are subordinated and the operation is contingent upon the conditions expressed in the article 1753. That article was incorporated into our system of laws from the Roman law and the Spanish codes. It is not found in the Napoleon Code, but is derived from the Justinian Code. *De secundis nuptiis*. Title 1, *Novellæ Constitutiones* 22, chapter 23.

*Si vero sit soboles et filios exhonoratos viderit lex, tunc omni largitate a viro ad eam veniente eam secundum proprietatis privat partem, solum ei derelinquens usumfructum. * * * * * Et generaliter dicendum est, quod omnis eam deserit proprietatis modus in iis, quæ a priore viro in eam venerunt.*

"But if the law discover that children and offspring are in this manner dishonored, then it deprives her, the mother, as to the matter of ownership of all munificent donations coming from the husband to her, leaving to her only the usufruct. * * * * * and generally it is said that every form of ownership leaves her in those things which came to her by a former husband."

"*Secundarum nuptiarum damna incommodaque aut communia sunt utriusque conjugis aut uxoris propria. Et illa quidem ad lucrorum nuptialium spectant jacturam. Vocamus autem lucra nuptialia: quæcunque ex ratione qualicunque, ad matrimonii tamen spectante causam, alter conjugum ex alterius bonis lucratus est, sive sponsalitia largitate id factum sit, sive conjugali donatione, itemque sive testamento lucrum ei obvenerit, sive lege, quo in genere etiam sunt, quæ propter divortium alteri eripiuntur, alteri adjiciuntur.*" Muhlenbruch *Doctrina Pandectorum*, sec. 542.

"And indeed they (the losses and inconveniences of second marriages) contemplate the loss of nuptial gains—and we call nuptial gains whatever from any source, having reference to the purpose of marriage, enriches one of the spouses from the property of the other, whether that be effected by nuptial gifts or conjugal donation; likewise whether it be denied to the wife by testament or by law. In this

class also are reckoned the things which on account of divorce are taken away from one of the parties and transferred to the other."

The attitude of the parties to this litigation would seem to present a case provided for by the article 1753 of our code. During the marriage large and valuable donations were made by the husband to the wife, in the form of the manual gift. The husband died, leaving children by his marriage with the donee, who has contracted a second marriage, the children of the donor still living. But in this case we conclude that the provisions of that article can not be enforced, for the reason that the substance of the donation is no longer tangible nor susceptible of identification. The property, the ownership of which, in such a case, becomes vested in the children, must be the same property that was donated to the wife by the husband during the marriage. The money constituting the particular donation under consideration, has long since been used by the executrix for the benefit of herself and family. As regards the rights of the opponents, it is no longer *in esse*. The ownership of it can not be enjoyed by the children nor the usufruct of it by the mother. We conclude, therefore, that the executrix can not be held liable for this sum of \$28,000, as contended for by the opponents. The judgment of the court below in regard to this item is not sustained. See 13 An. p. 143, *Neely v. Stokes*; 10 An. 679, *Cook v. Doremus*, and various cases there cited.

The counsel for the executrix, in their answer to the appeal, allege that through error and inadvertence of the auditor the executrix did not receive credit for \$12,212 38, excess in amount of disbursements on account separate estate of Hale over receipts from his separate estate. We conclude from the auditor's statement made twenty-seventh May, 1872, and filed subsequently to his report, that there was error in the judgment as alleged, arising from error and omission on his part. The judgment must be amended, allowing the credit claimed. They claim a credit for \$1282, amount of rent collected by Hale for Mrs. Jernsan, and paid by executrix after Hale's death, and which it is alleged she omitted to enter as a debit on the account, the fact of its being a debt of the community not having been known until stated by Hyland in his testimony. It appears to stand upon the same basis with that of the debit of James Hale, rent \$7000 placed on the tableau and duly audited and allowed.

This credit must be allowed. They claim credit also for \$677, amount of various disbursements set forth in document marked C and not entered upon the account of the executrix, and which should be added thereto. Copied from the ten pages of Book of Expenditures marked N. This credit should also be allowed.

A further credit of \$1959 15 is contended for in favor of the execu-

Succession of Thomas Hale.

trix for the reason that, from the corrected report of the auditor fixing the amounts received by the executrix as shown by the rent rolls of Hyland, various sums amounting to \$1059 15 were not deducted as they should have been, the executrix having accounted for these items on her tableau. The claim to this correction we are satisfied is well founded and it must be allowed.

A further credit of \$2165 is claimed by the executrix as having been improperly charged by the auditor against her, the amount being for rents collected by Hyland and not paid over to Mrs. Hale. Both the executrix and Hyland say that this sum of \$2165 was not paid over to her. The auditor states in his evidence accompanying his corrected report that there was evidence that Hyland had not paid over this sum of \$2165 to Mrs. Hale, but, as that sum was for rents and they were collected by Hyland as the agent of Mrs. Hale, he charged them against her. We have not found from the evidence that the auditor was in error in debiting this sum to Mrs. Hale. The credit for this sum we conclude should not be allowed.

It is therefore ordered and adjudged that the judgment of the district court be amended as herein altered and modified, and as herein before specified, and as so amended it be affirmed. All costs to be paid by the succession.

Rehearing refused.

No. 5082.

SUCCESSION OF JAMES W. PIPES.

Deciding that the exceptions filed to the original rule in this case by the defendant Mrs. Pipes, are well taken, and that at that time, the parish court had no jurisdiction *ratione materiae*, or *ratione personae*, her subsequent appointment as administratrix, which she provoked, brings the succession within the control of the parish court, and she has therefore subjected herself to its jurisdiction.

On the amended rule taken on Mrs. Pipes, administratrix of the estate of her deceased husband and tutrix of her minor children, to show cause why a certain piece of property mortgaged to secure a promissory note indorsed by the deceased, should not be sold for payment of the same, after the plaintiff had introduced his evidence consisting of the note, the confirmation of Mrs. Pipes as natural tutrix, the account on which he figures as a creditor, its publication, and the judgment homologating the same, the defendant offered evidence to establish the allegations in her answer, to wit: That she had never filed any account, and that no one was authorized to file one for her. The plaintiff objected to the reception of this evidence, on the ground that it was attacking the judgment collaterally. The judge *a quo* maintained the exception. It was an error.

The defendant merely sought to show that the judgment upon which the plaintiff relied, was in reality no judgment against her. The plaintiff having rested his case upon the judgment, the defendant was authorized to show that the judgment had no foundation to stand upon. It is now a well recognized doctrine that one may use as a shield, what he can not use as a weapon.

Succession of James W. Pipes.

A power of attorney given by the administratrix of an estate, to administer her own affairs can not be construed to extend to the administration of the estate of her deceased husband. The power of attorney granted to a person to manage the affairs of a succession, must be express.

The account not having been filed by the administratrix, nor by any one authorized by her, nothing therein contained can be considered as binding upon her or upon the estate which she represents.

The claim of the plaintiff, if not kept alive by the judgment rendered on the tableau, is long ago prescribed.

A PPEAL from the Parish Court, parish of Iberville. *Crowell, J. A. & E. B. Talbot*, for plaintiff and appellee. *Favrot & Lamon*, for defendant and appellant.

MORGAN, J. The succession of James W. Pipes was opened in the Parish of Iberville. His widow was confirmed as natural tutrix of her children, who were minors at the time and as such she administered upon the estate. These proceedings took place in the year 1860.

Subsequently, Mrs. Pipes removed to another parish in this State, whence she migrated to Texas. This took place in October 1863. She returned to Louisiana, permanently, in 1867, and seems to have selected the Parish of East Baton Rouge as her domicile. On the fourth January 1868, she appeared before the Recorder of that parish, and formally renounced the community of acquets and gains which had existed between her husband and herself. This renunciation seems to have been filed on the tenth January 1868.

On the second May 1870, N. K. Knox, appearing for the use and benefit of Richard Burke, took a rule upon Mrs. Pipes, in which, alleging that he is the holder and owner of a promissory note for \$7500, with eight per cent. interest thereon from the first January 1863, drawn by Charles Pipes to the order of and indorsed by James W. Pipes, dated seventh June 1857, and payable on the first January 1861, the note being secured by mortgage and vendor's privilege upon a certain property situate in the parish of West Baton Rouge; alleging further that Mrs. Pipes, administering the estate of her deceased husband as widow in community, and natural tutrix to her minor children, filed on the ninth November 1865, a provisional account of her administration which, after due publication, was homologated by the judge, and that upon this tableau he was placed as a creditor for the amount of the note which he now holds, and that his mortgage and privilege was therein recognized; and alleging that he has a right to have said property sold for cash to pay his debt, interest and costs, took a rule upon Mrs. Pipes, as widow in community and as tutrix to her minor children, to show cause why the property referred to should not be sold for cash, and his mortgage and privilege claim be paid.

To this rule Mrs. Pipes pleaded:

First—That the Parish Court had no jurisdiction *ratione materiae*, be-

Succession of James W. Pipes.

cause her children having reached the age of majority, or being emancipated, she can not administer the estate of her husband as natural tutrix.

Second—Because, if surviving partner in community and responsible, the demand against her exceeding \$500 can not be enforced by the parish court, for want of jurisdiction.

Third—That the court had no jurisdiction *ratione personæ*, as she is not sued at her domicile.

Subsequently she applied to be and was appointed administratrix of her deceased husband's estate.

The exceptions were tried and maintained, reserving to the plaintiff in rule the right to amend and make Mrs. Pipes a party as administratrix, which was done.

In her answer she reiterates all the averments, allegations, and defenses which she made in her exception. She admits that a pretended account was rendered in her name as tutrix administering the estate of her husband, and that the account was homologated; but she denies that the account was filed with her knowledge or consent, or that the attorney who filed it had any authority whatever to present it; that the account could have no effect against her, the heirs or creditors of the estate, because it merely purports to give a statement of the creditors of the estate and the debts which may have been paid or were then due, or of the property of the estate then existing in kind, but does not show that she had collected and disbursed any money of the succession, and was, therefore, neither an account nor a tableau of distribution. She prays that the account presented by the attorney on the nineteenth December, 1865, and the judgment of the court of the third January, 1866, homologating the same may be declared null and void, that the rule taken against her be dismissed, and, finally, to plaintiff's demand she pleads the prescription of five years.

There was judgment against her, and she has appealed.

Assuming that the exceptions filed to the original rule were well taken, and that, at that time, the parish court had no jurisdiction *ratione materiæ*, or *ratione personæ*, her appointment as administratrix (which she provoked) brings the succession within the control of the parish court, and she has therefore subjected herself to its jurisdiction.

Knox excepted to the answer filed by the administratrix, on the ground that it seeks to set aside and annul indirectly a judgment of the district court, which can only be done he says by a direct action. On the trial of the rule, after the plaintiff had introduced his evidence consisting of the note he holds, the confirmation of Mrs. Pipes as natural tutrix, the account upon which he figures as a creditor, its publication and the judgment homologating the same, the defendant

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offered evidence to establish the allegations in her answer, viz: that she had never filed any account, and that no one was authorized to file one for her. The plaintiff objected to the reception of this evidence on the ground that it was attacking a judgment collaterally. His exception was maintained. We think our brother of the parish court erred. Defendant was not an actor seeking to annul a judgment which had been rendered against her. She merely sought to show that the judgment upon which the plaintiff relied was in reality no judgment against her. The plaintiff stood his case upon the judgment. She was, we think, authorized to show that the judgment had no foundation to rest upon. We believe it is now a well recognized doctrine that one may use as a shield what he can not use as a weapon. The judgment was worthless against her, she never having signed the account upon which it was rendered, and never having authorized any one to sign or present it for her. To this end her testimony is positive, and the attorney who filed the account unsigned by her, says that he was never directly authorized by her to file it. He says he did so with the approbation of her son-in-law with whom he consulted, and who, he supposed, held her general power of attorney, though he never saw it. He did hold her power of attorney, but this power of attorney gave him control over her own affairs alone, and contains no mention whatever of the estate of her husband. We understand that the power of attorney granted to a person to manage the affairs of a succession must be express. He says he did have a conversation with the counsel who told him that he intended to file an account and place Knox upon it, but that he remonstrated with him and that he had no knowledge of its having been filed until the service of the present rule upon Mrs. Pipes.

The account not having been filed by the tutrix, nor by any one authorized by her, nothing therein contained can be considered as binding upon her or upon the estate which she represented.

The claim, if it was not kept alive by the judgment rendered on the tableau, is long ago prescribed. The note was due on the first January, 1861. These proceedings were instituted only on the second May, 1870.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be avoided, annulled and reversed, and that there be judgment in favor of the defendant in the rule, plaintiff paying costs in both courts.

WYLY, J., *dissenting*.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, opponent.

No. 5107.

SUCCESSION OF DANIEL WILLIAMS—MRS. SARAH A. WILLIAMS, Administratrix, Opponent.

The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section 9 of the Revised Statutes of 1870 is only an incident to the suit.

APPEAL from the Probate Court, parish of St. Helena. *Barett*, acting Parish Judge. *T. & E. J. Ellis* and *J. H. Mack*, for opponent and appellee. *Kernan & Lyons*, for appellants.

LUDELING, C. J. The succession of Hiram Williams was administered by Daniel Williams. In November, 1870, the widow of Hiram brought suit against Daniel Williams, administrator, to destitute him of his office, to compel him to account, and to have the penalty of the law inflicted upon him. This suit was brought in the parish court, from which the administrator had received his appointment, and there was judgment against Daniel Williams, removing him from his trust, ordering him to render an account, and condemning him to pay to the estate of Hiram Williams ten per cent. on the various amounts for which he was responsible. Daniel Williams having died shortly after this judgment, his widow became the administratrix of his succession. In 1873, she filed her final account of Daniel Williams' estate, and the widow and administratrix of Hiram Williams' estate filed an opposition to said account, and prayed to have the amount of the judgment in favor of the estate of Hiram against Daniel Williams placed on the tableau of debts. The opponent opposed several items on the account, but as, in our opinion, the judge *a quo* correctly decided these questions, which depended only upon the evidence, we deem it unnecessary to review them in detail here. The accountant moved to dismiss the opposition on the ground that the succession of Hiram Williams was not creditor to the estate of Daniel, inasmuch as the judgment aforesaid was rendered by a court without jurisdiction *ratione materiae*, and was, therefore, utterly null. The judge *a quo* refused to dismiss the opposition, and rendered judgment in favor of the opponent for \$3195 27. From this judgment the accountant appealed.

The proceeding to destitute an administrator and to force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section nine of the Revised Statutes of 1870, is only an incident to the suit.

We think that substantial justice has been done between the parties by the judgment appealed from.

It is therefore ordered and adjudged that the judgment be affirmed with costs of appeal.

Rehearing refused.

Blanc v. Scruggs.

No. 5029.

JULES A. BLANC v. S. O. SCRUGGS.

The evidence shows that the defendant never objected to the incorrectness of the account rendered to him until after the institution of this suit on said account. It is an account stated: *compte arrêté*. The prescription of three years does not apply to such an account.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. William M. Levy*, for plaintiff and appellant. *O. Chaplin & Sons, Jack & Pierson*, for defendant and appellee.

LUDELING, C. J. This suit is to recover the amounts of a note and an account alleged to be due by the defendant.

The defence relied upon is the prescription of five years against the note and three years against the account.

The evidence shows that the course of prescription against the note was interrupted by the acknowledgment of the debt, before its prescription. It also appears from the evidence that the account was rendered to defendant and that he never objected to its incorrectness until after the institution of this suit. It is an account stated *compte arrêté*, and the prescription of three years does not apply to such an account. 20 An. 119. See 19 An. 185; 4 La. 544; 14 La. 34; 3 Rob. 362; 12 Rob. 544; 4 An. 197, *Freeman v. Howell*.

It is therefore ordered and adjudged that the judgment of the lower court be annulled; and that there be judgment in favor of the plaintiff and against the defendant, for the sum of three thousand five hundred and four dollars and forty-two cents, with eight per cent. per annum from the sixteenth of March, 1861, with recognition of mortgage on the property described in the act of mortgage; and for the further sum of one thousand six hundred and seventeen dollars and thirty-eight cents, with five per cent. per annum from the sixteenth of May, 1861, till paid, and costs of both courts.

No. 5012.

BRIDGET BOOKEL et al v. JOSEPH RUDMAN et al.

Judge fixed no amount for the appeal bond and a suspensive appeal was granted. If bond conditioned according to law, the appeal will be dismissed. The amount of appeal bond is not sufficient for a suspensive appeal, and it will not do for a deponé, because it was not for an amount fixed by the judge.

APPEAL from the Seventh Judicial District Court, parish of Pointe à la Paille. *Farrar*, Judge *ad hoc*. Jury trial. *Leake and Powell*, for plaintiff and appellants. *John Yoist & E. Phillips*, for defendants and appellees.

J. In this case the judge fixed no amount for an appeal

 Bockel et al. v. Rudman et al.

bond. A suspensive appeal was granted on appellants giving bond conditioned according to law.

The amount of the appeal bond is not sufficient for a suspensive appeal. It will not do for a devolutive appeal, because it is not for an amount fixed by the judge. The motion to dismiss on this ground must therefore prevail.

It is therefore ordered that the appeal herein be dismissed at appellants' costs.

Rehearing refused.

 No. 5058.

E. BOEDICKER v. JOHN EAST et als.

Objection was made by defendants to the introduction of a diagram marked A, on the ground that, in an action of boundary, an official and authorized survey only can be made the basis of proceeding, and that the diagram being a private instrument or act of the plaintiff, is inadmissible. The court *a qua* admitted the diagram to be used by the witnesses on the stand to show the *locus in quo*, and the boundary in dispute. This ruling was correct under the pleadings. The plaintiff had the right to show the existence and locality of the alleged ancient line of division between the lands of the parties by parol evidence, and the diagram was admissible to enable the witnesses to render their testimony intelligible to the court and jury.

The objection to the admission of evidence showing that John East had pointed out to plaintiff in 1871, the line in question as the established boundary, was not well founded. John East is one of the defendants, and the husband of Frances East, the owner of the land, and seems to have acted for his wife.

A bill of exceptions was taken to the admission of testimony introduced by the plaintiff to disprove a statement made by one of his own witnesses. The testimony was admissible. It was offered not to impeach, but to rebut. This court understands the rule to be, that although a party introducing a witness is not permitted to impugn his character for veracity, and to show that he is not worthy of belief, he may nevertheless introduce evidence to rebut a statement made by the witness as to a particular fact.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Cole, J.* Jury trial. *Kernan & Lyons, Kilbourne & McVea*, for plaintiff and appellee. *K. A. Cross & D. O. Hardee and O. P. Defee*, for defendants and appellants.

TALIAFERRO, J. This action was instituted by the plaintiff to prohibit the defendants from encroaching upon his land in disregard of the ancient boundary line established between their tracts, and to recover damages for the wrongful encroachment so made by the defendants upon his premises, and to have the alleged ancient boundary line between those tracts recognized. The plaintiff proceeded by injunction against defendants who disregarded the order, and the plaintiff sued out a second injunction which the defendants succeeded in having dissolved by entering into bond. From the order dissolving the injunction the plaintiff appealed. This court, in March, 1872, annulled the order and reinstated the injunction. 24 An. 154.

The case was tried before a jury, which returned a verdict in favor of the plaintiff, recognizing the ancient boundary line delineated upon a diagram in the record, designated by the letter A, and awarded the plaintiff eight hundred dollars damages. From this judgment the defendants have appealed.

In an amended answer to the appeal, the defendants pleaded the prescription of five, ten, twenty and thirty years.

The decision of this case depends mainly on questions of fact. Before proceeding to consider the evidence, it will be proper to examine several of the various bills of exceptions found in the record. Objection was made by defendants to the introduction of the diagram marked A, on the ground that in an action of boundary an official or authorized survey only, can be made the basis of proceeding; that the diagram being a private instrument or act of the plaintiff, is inadmissible. The court admitted the diagram to be used by the witnesses on the stand, to show the *locus in quo* and the boundary in dispute. We think the ruling correct under the pleadings.

The plaintiff, as we understand his petition and supplemental petition, is not suing to have the boundaries of the parties established as a matter not distinctly and satisfactorily understood, but rather to restrain the defendant from infringing upon his rights in an illegal and unwarrantable manner by interfering with him in the construction of a fence along the ancient and well defined boundary line between their lands, by illegally causing his laborers and employes to desist from the work of building the fence, and by forcibly crossing the division line between them and occupying about one hundred acres of his cleared land, and that in disregard and violation of the first injunction he had to resort to, to preserve his rights. He prays that the alleged ancient division line be recognized as the boundary between the two tracts. Under these allegations we think the plaintiff had the right to show the existence and locality of the alleged ancient line of division between the lands of the parties by parol evidence, and that the diagram was admissible to enable the witnesses to render their testimony intelligible to the court and jury.

The plaintiff in his own testimony, offering to prove that after his purchase of the land, John East, one of the defendants, pointed out to him in 1871, the line in question, as the established boundary between the tracts, objection was made that as to Mrs. Frances East, the owner of one of the contiguous tracts, such statements were *res inter alios acta*, and could not affect her. The court admitted the evidence on the ground that Mrs. East's ownership of the land was not perfected until July, 1872, the time of the registering of the adjudication of the land to her in March, 1872, at sheriff's sale; that it only took effects a

Boedicker v. East et al.

against a third party, from the time it was recorded. The testimony was properly received. John East is one of the defendants, and the husband of Frances East, the owner of the land, and seems to have acted in this controversy for his wife.

A bill of exceptions was taken to the admission of testimony introduced by the plaintiff to disprove a statement made by one of his own witnesses. From the judge's addendum to the bill it appears that a witness, introduced by the plaintiff, volunteered the statement that the plaintiff Boedicker, told him the portion of land in controversy belonged to East; that this statement was not made in answer to any interrogatory put to him, and that the court admitted the testimony not to impeach but to rebut.

The testimony was admissible. We understand the rule to be that although a party introducing a witness is not permitted to impugn his character for veracity, and to show that he is not worthy of belief, he may nevertheless introduce evidence to rebut a statement made by the witness of a particular fact.

We learn from the record that the plaintiff's land, as far back as 1833, was owned and occupied by one W. D. Carter; that this occupancy was continued by him for a number of years, and after he left the place, that it continued in the possession of his wife until her death, in 1862; that it was sold at private sale in 1867, purchased by Kernan & McVae, and by them sold to Boedicker, the plaintiff, in 1869. The contiguous tract owned by Mrs. East, was purchased by her husband, John East, one of the plaintiffs, from Mrs. Barksdale in the year 1857, he having occupied the plantation the year previous under a lease. In the year 1851 or 1852, W. D. Carter laid off a road on the division line, built a fence and dug a ditch along this line. One of the witnesses, Gray, lived on the Barksdale place from 1849 until 1856, the year that John East occupied it under a lease. Gray and Kirkland cultivated the Barksdale place adjoining Carter's during several years. They say in their testimony that Carter cultivated up to the line. They recognized the line as the correct and proper division line between those tracts. Kirkland says that Carter cultivated up to that line, and that the land was cultivated up to that line up to the death of Mrs. Carter in 1862. Jim Moore, a freedman who was owned by Carter, was on Carter's place from 1833 until 1863, a period of thirty years. He testifies that the line along which Carter in 1851 or 1852 laid off the road was run by a United States surveyor named Bates, but does not state the time; says that the fence was built ten feet inside of Carter's line to leave room for a road; that he, the witness, laid off the road with a plow; "that the fence built there by Carter remained until the war; that some part of the fence was there

in 1871; that the road was still visible, badly washed in places, the remains of the bridge still on the bayou, the fence now grown up with cane, pieces of rail still there." This witness says the ditch was made as soon as the road was completed; that when East came there, he built his fence on the other side of the road made by Carter; that the boundary line where the old fence is now, was made there before Mr. East bought the place where he now lives; that witness remained on the Carter place several years after Mr. East moved on the adjoining place; never heard of Mr. East claiming any land on the opposite side of the road or across the road as laid out. States that when John East or Mrs. Frances East bought the adjoining place, he, Mr. East, put his fence also on the line laid out by Mr. Carter, leaving sufficient space for a road.

Dr. John B. Whitaker states that he has lived within a few miles of the Carter place from childhood; knows the road as the line established by the surveyor, Bates, with whom witness was well acquainted; does not remember distinctly the date of the fixing of the boundary line, but is positively certain it was more than twenty years ago; was present while the survey of the line was being made; knows that Mr. Carter and the community around considered the road as the boundary line; that Mrs. Carter offered to build a house as a residence for witness anywhere on her side of the boundary line between B and E; never heard any question about the ownership of the land in controversy till since the institution of this suit between the plaintiff and the defendant.

On the part of the defendant, a diagram marked K, was introduced, and in connection with it the testimony of Farrar, a surveyor, who made it. The purport of this evidence is to show that the diagram A is incorrect. This witness admitted that he made the diagram K, by getting a copy from the parish map of the bearings and distances of the whole diagram, except the line A B, in red ink. He admitted that he knew nothing of the ownership of the lands nor of the claims except what Mr. East told him. Atkinson, a witness for defendant, knew the lands since 1849; heard Barksdale say he did not regard the "new road" as the boundary line; that a great many did not regard it as the boundary line, but does not know that everybody did not so regard it; that Carter exercised no possession of the land previous to the years 1852 and 1853, when he was cutting wood from the land for sugar making; that he acted like a man who was cutting off the timber merely for wood. This witness, the surveyor and Zackery, are the only witnesses on the part of the defense, except the defendants themselves. John East states that Carter obtained permission from him to cut timber from the land in dispute for wood, to be used in

boiling sugar, and that subsequently he gave the same permission to Mrs. Carter; that both Carter and his wife proposed to buy the land in dispute from him; that he did not consider the road as it now runs as the dividing line. The testimony of Dr. East, a son of John East, and one of the defendants, is in the main confirmatory of that of his father. The testimony of Zackery has no bearing upon the question of the division line.

We think it is established that certain laborers of the plaintiff, while engaged in constructing a fence for the plaintiff along the division line, were threatened and made to desist from their work by John East. The plaintiff swears that, in consequence of this conduct of East, his laborers left his place, and he failed that year to make a crop in consequence. The testimony of Zackery, who it seems was one of the plaintiff's employes, confirms the statement of the plaintiff in regard to the laborers leaving his place, but this witness denies that the defendants caused him to leave the plaintiff's employ. John East himself admits that, in passing by where the laborers were at work on the fence, he pointed out to them a line mark on a hickory tree, and told them, when they got there, they would have to stop.

It is clear that the testimony preponderates decidedly in favor of the plaintiff. It is shown beyond all reasonable doubt by the evidence of Moore, Whitaker, Gray and Kirkland, that the division line was established by Carter in 1851 or 1852, five years at least before East bought the Barksdale tract. No objection, to the knowledge of these four witnesses who lived, one of them on the Carter place and the others in the close vicinity of it for many years before East came there, was ever made to the location of this line by Barksdale, or any prior owner of the tract now held by Mrs. East. Neither was any objection to it ever heard of by them as being made by East, after he bought and occupied the tract now owned by his wife. More than that, their evidence is to the effect that East himself always recognized the line as the division boundary line between the two tracts. The claim he now sets up is shown to be of quite recent origin.

The plea of prescription set up by defendants is unavailable. Their demand of one thousand dollars in reconvention was properly rejected.

We think the decision of the court *a qua* was properly rendered in favor of the plaintiff.

Judgment affirmed.

Cushing et als. v. Harmonson et als.

No. 5085.

WILLIAM L. CUSHING et als. v. S. L. HARMONSON et als.

Where the plaintiff, individually and as administrator of a succession, sues to annul the sale of the succession property and other proceedings held in connection with the settlement of that succession, on the grounds that his attorney exceeded his authority therein; that the sale was null, no price being paid; and that all said mortuary proceedings were had without his knowledge or authorization, and were in fraud of his rights; and where said plaintiff instituted this suit more than six years after the sale which he seeks to annul; Held—That under the circumstances presented in the record, this court can not think there should be much hesitancy on rejecting plaintiff's demand.

Whatever may be the ordinary relations between the administrator of a succession and his attorney conducting the necessary judicial proceedings in the settlement of a succession according to the laws of this State, an administrator, residing in a parish distant from that where the succession is opened, who showed so little interest in, and attention to, his fiduciary trust, who allowed such a length of time to elapse before taking a single step of a personal nature, and who committed the whole succession to the sole management of his attorney, should not be heard with much favor when he asks a court of justice to undo what it has done at the request of his attorney.

It was the duty of the administrator, as an officer of the court, to know what proceedings were being had in the succession administered by him and to present himself, or have another attorney to represent him, in the place of the one who had died. To grant his demand would be a premium upon negligence in fiduciary agents and officers of courts.

The prescription of one year to this action of nullity is properly invoked. The argument of the administrator that prescription only began to run when he discovered the alleged fraud practiced upon him, can not be of any avail, as he was bound in law to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care.

A PPEAL from the Parish Court, parish of West Feliciana. *Haralson, J. Samuel J. Powell*, for plaintiffs and appellants. *H. H. Leake*, for defendants and appellees.

HOWELL, J. The plaintiff, individually and as administrator of the succession of G. W. Miles, deceased, sues the widow and minor heirs of the deceased and the creditors of the succession, to annul the sale of the succession property, the final account filed in his name, the judgments homologating the same, the judgments upon oppositions filed, the judgments making him personally liable for the debt due the widow and heirs, and all the mortuary proceedings on and subsequent to the date of said sale, on the grounds that his attorney exceeded his authority therein, that the sale was null, no price being paid, and that all said mortuary proceedings were had without his knowledge or authorization, and are in fraud of his rights. He makes oath to the allegations of his petition.

The defense is, besides the general issue, that the petition contains no legal grounds for annulling the said judgments; that the price should have been tendered; that if any irregularities existed, they are prescribed by five years; that plaintiff was not a creditor of the deceased, and opened the succession to collect the claim of a creditor, whose agent he was, and that he was aware of and ratified said pro-

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seedings, and they pleaded the prescription of one year in bar of his action.

From a judgment against him, the plaintiff has appealed.

The facts necessary to be understood, are the following: In January 1867, the plaintiff, a resident of New Orleans, applied, through W. D. Winter, his attorney in the parish of West Feliciana, for letters of administration on the succession of G. W. Miles, deceased, in said parish, alleging himself to be a creditor. Upon taking the oath and giving security in New Orleans, by virtue of order to that effect, letters were issued to him, and in June following, upon a petition signed Winter & Butler, attorneys, an order issued to the sheriff to sell for cash all the property inventoried, consisting of an undivided half of a tract of land and the saw mill and machinery thereon in said parish. On the sixteenth July following the sale was made, the process verbal showing that the land was adjudicated to one L. L. Babers for three hundred and three dollars and twelve and a half cents, the appraisement; and the saw mill and fixtures were adjudicated to Gaty, McCune & Co. for \$1650, the appraisement thereof, and that the purchasers complied with their bids by paying the cash, the sheriff taking a receipt for the amount of the sale, signed by "Winter & Butler, attorneys for administrator."

It is shown, however, that the cash was not paid, but the amount of each bid, less the proportion of each bidder of all the costs of settling the succession, was credited by W. D. Winter, attorney, on the claim of each of said bidders against said succession. These were the only creditors left by the deceased, and their claims were only partially extinguished by this process: One Babers, who resides in Mississippi, held a mortgage on the land, and the others, Gaty, McCune & Co., residing in St. Louis, Mo., were the vendors of the mill and machinery, and the plaintiff was their agent, and took the administration, as he says in his depositions, to collect the said claims. Prior to the sale, but after the date of the order therefor, the plaintiff wrote to his attorney, Winter, acknowledging the receipt of a letter from the latter, inquiring about the situation and value of the land to be sold, stating that his wife wished to make an investment for their little boy, and that she would authorize him to purchase the land if he thought advisable, and in a letter dated July 1, 1867, he informed his attorney that he had sent an engineer up to examine the machinery. On the day of the sale, July 16, 1867, Winter wrote a letter to plaintiff informing him that he had bought the saw mill for Gaty, McCune & Co. at the appraisement, and the land for Babers at the appraisement, describing the advantages of the land, asking him if he wished it at said bid, and in whose name he wished the title made, and directing

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him where to deposit the price, in case he concluded to take it, and telegraph his conclusion. On twentieth same month Winter wrote again to plaintiff, saying: "There was no other bidder but myself on either. I was compelled to bid the appraisement for Messers. Gaty, McCune & Co., \$1650, on saw mill. As I explained to you in the city, it mattered not whether my bid for them was \$1200 or \$3000, their liability in either event being the same, viz., for costs in the succession. I inclose a statement showing whole amount of costs, their proportion of same, also my account showing balance due me of three hundred and seventy-four dollars, which I would be glad to receive without delay. I send duplicate of this with inclosures to Given Campbell, Esq., by this mail."

Plaintiff says in October, 1873, in answer to an order to produce, that he can not find the above letters, and if he ever received any such letters, they were probably forwarded to Gaty, McCune & Co., of St. Louis. The letters and answers to interrogatories of Given Campbell, Samuel Gaty and Gaty, McCune & Co., show that they were informed of Winter's acts in regard to said sale; that the latter paid their proportion of all the costs of the succession, and authorized Winter to sell the machinery for their account.

The plaintiff, as a witness, says that some years ago, the exact time he can not recollect, Gaty, McCune & Co. wrote to him that they had bought the machinery and wished him to dispose of it, and he sent a person to examine it, but did not sell it. He says also that winter may possibly have explained to him after the adjudication, that the said parties had bought without paying the cash.

In February, 1868, a final account was filed, signed "W. L. Cushing, administrator, by his attorney, W. D. Winter," showing the expenses of the administration and the amounts allowed Babers and Gaty, McCune & Co., amounting in all to the sum of the two bids of these parties, for all of which receipts are in the record. To this account Mrs. Harmonson, as widow and the tutrix of the minor children of the deceased, filed an opposition in the district court, objecting to the items in favor of Babers and Gaty, McCune & Co., and claiming the same for herself and the minors. Winter, as counsel for these two creditors and the administrator, filed separate answers for them in January 1869, to the opposition of Mrs. Harmonson. The account was two days thereafter homologated so far as not opposed. In January 1871, Winter was killed. In March following, the opposition of Mrs. Harmonson was sustained, and the account, as amended, homologated by judgment of the district court. The proceedings were transferred to the parish court, and there again the said opposition was sustained, and the account homologated in May 1871. No attorney, it seems,

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appeared for the administrator in said proceedings, the firm of Winter & Butler having been dissolved a year before the death of the former, and the latter stating to the counsel of the opponents that he was not authorized to represent the administrator.

In April 1873, Mrs. Harmonson ruled the administrator to show cause why execution should not issue against him personally. In May, after answer filed, the rule was made absolute and the administrator appealed; but the appeal was set aside for insufficiency of the bond, and in September following (1873), more than six years after the sale which he seeks to annul, this suit was instituted by him.

Had the creditors or heirs made the demand, we would have difficulty in determining the questions that might properly arise in such a controversy; but when it is made by an administrator, under the circumstances presented in this record, we can not think there should be much hesitancy in rejecting it. Whatever may be the ordinary relations between the administrator of a succession and his attorney, conducting the necessary judicial proceedings in the settlement of a succession according to the laws of this State, we do not think that an administrator, residing in a parish distant from that where the succession is opened, who shows so little interest in and attention to his fiduciary trust, and allows such a length of time to elapse before he takes a single step of a personal character, but committed the whole succession to the sole management of his attorney, as plaintiff not only admits by his pleadings, but even urges in his argument, should be heard with much favor, when he asks a court of justice to undo what it has done at the request of his attorney, or what the acts of his said attorney give other parties the right to do.

The plaintiff, as all administrators do, took an oath to faithfully discharge and perform all the duties incumbent on him by law as administrator, and yet after more than six years, he not only virtually admits that he has not performed his duty, but alleges that all that has been done by his attorney was unauthorized by him, unknown to him, and in fraud of his rights, and asks that it all be declared null, and this solely for his own personal interest and advantage, and not for the benefit of his heirs or creditors. The evidence, however, brings conviction to our minds that he was not ignorant of the sale to be made, and as it was made, or of the death of his attorney, and it was his duty to attend, at once, to having another to represent him in the proceeding at the time in the court. The parties, who had made up an issue with him, had a right to have that issue determined. The judge might well have delayed the trial and required the administrator to be represented by counsel; but his not doing so, is not, in this instance, a legal cause for the said administrator to annul the judg-

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ment on that issue. He had a year from the dates of the judgments sustaining the opposition to and homologating the account, to appeal and have them reversed, if erroneous, and he can not now be heard to plead ignorance or absence, or want of counsel as a cause of nullity.

It was his duty, as an officer of the court, to know what proceedings were being had in the succession administered by him, and to be present himself or have an attorney to represent him. To grant his demand, would be a premium upon negligence in fiduciary agents and officers of courts.

We think, too, the prescription of one year to his action of nullity is properly invoked. His argument that prescription only began to run when he discovered the fraud, as he alleges, on being served with the rule to make him personally responsible, can not avail him, as he was bound, in law, to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care.

Judgment affirmed.

No. 5010.

LOUIS DUPLEIX v. ALEXANDER DEBLIEUX, Executor

The plaintiff has instituted this suit to recover the amount of certain notes which he gave for having purchased at the succession sale, of one Sompeyrac the undivided half of a tract of land. He alleges that these notes were paid in error, having recently discovered that the said succession had no title to the undivided half of the tract of land so sold and adjudicated to him, and hence that he paid what he did not owe and for something which he did not acquire.

The plaintiff's action is premature, as no eviction or disturbance has occurred; and if it be considered an action of rescission, which it is in effect, it is defective, because plaintiff has been in possession several years, has made no tender of the property, or offer to return the same to the defendant, nor made an allegation that he has been disquieted, or has a just reason to fear disturbance or eviction. The demand, as made, puts the plaintiff in the position of keeping the property and demanding the return of the price.

A PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborne, J. J. B. T. Tucker, A. & W. Voorhies*, for plaintiff and appellant. *Morse & Dranguet*, for defendant and appellee.

HOWELL, J. In November 1863 the plaintiff purchased at the succession sale of A. Sompeyrac, deceased, the undivided half of a tract of land, described in the petition, for which he executed two notes due first of April, 1865 and 1866 respectively, which he paid at maturity of each. In February, 1872, he instituted this suit to recover the amount of said notes with interest, on the ground that he paid them in error, having recently discovered that the said succession "had no title to the undivided half of the tract of land so sold and adjudicated to him out of the Government of the United States at the date of the

28	218
52	1291
26	218
117	805

Duplex v. Duplex, Executor.

said adjudication," and hence he paid what he did not owe and for something that he did not acquire. The defendant excepted that plaintiff's suit "is premature for the reason that he had not been disturbed and much less evicted from the land described in the petition; that no such allegations are found therein." This exception was referred by the court to the merits and an answer was filed containing a general denial and said ground of exception. On the trial evidence was introduced by the parties and objections made thereto by each, and judgment of nonsuit was given and the plaintiff appealed.

The plaintiff insists that his action is not one for the rescission of the contract of sale, but one, under articles 2133 and 2452, R. C. C. and 18 C. P., for the restitution of what he has paid in error, the succession having sold the property of another.

In the case of *Bonnabel v. First Municipality*, 3 An. 700, in which similar allegations were made, the court held "that article 2452, (2427) must be reconciled with the provisions of article 2560, (2538) which are, that the purchaser, who has paid the price, can neither demand a *restitution* of it nor security even, during the pendency of the suit brought to evict him; and he can not, *a fortiori*, do so before any disturbance has taken place."

Applying this doctrine to the case now before us, the plaintiff's action is premature, as no disturbance nor eviction has occurred. And if it be considered an action of rescission, which it is in effect, it is defective, because he has been in possession several years, has made no tender of the property or offer to return the same to the defendant, nor made an allegation that he has been disquieted or has a just reason to fear disturbance or eviction. See 14 An. 473.

In the case of *Buford v. Valentine*, 3 N. S. 57, cited by plaintiff, there was a charge and proof of *fraud* on the part of the vendor, while in this no such charge is made. And in *Pepper v. Dunlap*, 9 R. 288, also relied on by the plaintiff, where the vendee was resisting payment, there was an allegation and proof that the claim of the vendor to the land had been rejected by the land commissioners and that it had, since the sale, been patented to other persons by the government. Here the simple allegation is that the succession has no title to the land out of the government of the United States. This, under the ruling in 3 An. above quoted, is not sufficient for a reclamation of the price paid, under the circumstances set out in the petition. The demand, as made, puts the plaintiff in the position of keeping the property and demanding the return of the price. We think there is no error in the judgment of nonsuit against the plaintiff on his allegations.

Judgment affirmed.

No. 2963.

BAKER & THOMPSON v. MRS. A. L. PAGAUD.

Assuming that a husband acted as the agent of his wife in matters connected with the general administration of her affairs or business, it must be shown that he had authority, express and special, sufficient to bind her by his promise to pay the debt of a third person.

Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol. It must be in writing, the law is prohibitory, and this court can not recognize any other proof to establish the fact.

It is well settled that men who furnish materials have no privilege, if the contractor with whom they dealt had none.

The acknowledged account of plaintiffs against Allison, the contractor, did not give them a privilege on the property of defendant, for whose buildings Allison had bought materials from them. At most it only entitled them to such privilege as Allison might have. Having failed to record his contract, Allison had no privilege; consequently the plaintiffs are in the same category.

Whatever sum the defendant may have in her hands, due on her contract with Allison, after deducting the amount expended to complete the buildings subsequently to Allison's abandonment of his contract, belongs to Allison, and it certainly can not be distributed among his creditors in this proceeding, because he is not a party.

The plaintiffs, who are creditors of Allison, have shown no authority from him to collect from defendant whatever sum she may owe on a final settlement.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-
lens, J. Hornor & Benedict*, for plaintiffs and appellees. *Randolph,
Singleton & Browne*, for defendants and appellants.

ON MOTION TO DISMISS.

WYLY, J. The motion to dismiss this appeal for want of proper parties and because the appellant has no appealable interest, can not prevail.

There was no want of proper parties in the court below, and the appeal having been granted on motion in open court and the appeal bond being in favor of the clerk, there is no want of proper parties here.

As to the want of appealable interest, we will remark that the defendant is the appellant, against whom the plaintiffs, in their petition, prayed judgment for \$1059 54 with interest at five per cent. per annum from the seventh of December, 1867. The amount in dispute between the plaintiffs and the appellant is the sum for which they prayed judgment against her, which far exceeds \$500.

How therefore the plaintiffs can say that the defendant has no appealable interest, we can not imagine.

The motion is overruled.

ON THE MERITS.

WYLY, J. In August, 1867, the defendant Mrs. A. L. Pagaud made a written contract with S. B. Allison, a builder, to erect a dwelling house on her lot on Dryades street and to furnish all the materials,

26	220
45	1426
26	220
113	448
26	220
118	183
26	220
125	251

agreeing to pay therefor \$3700 in the instalments mentioned in the contract.

Allison bought from the plaintiffs materials amounting to \$1166 72. Before the second instalment was due Allison abandoned his contract ; and Mrs. Pagaud completed the erection of the building. The plaintiffs sued Mrs. Pagaud for the price of the materials they furnished the delinquent contractor and sought to have recognized a privilege for the amount thereof on the dwelling of the defendant.

The court gave judgment against the defendant Mrs. A. L. Pagaud for \$1199 10 ; but decline to recognize the privilege ; and she has appealed. The appellees, however, pray for an amendment of the judgment so as to allow the privilege which they claim. As a question of fact we find that the debt sought to be enforced personally against Mrs. Pagaud was a debt contracted by Allison, the builder ; it was his debt. The plaintiffs, however, attempted to prove that, through her husband as agent, the defendant promised to pay the debt. This attempt we regard as a failure for two reasons :

First—Assuming that the husband acted as the agent of his wife in matters connected with the general administration of her affairs or business, it is not shown that he had authority, express and special, sufficient to bind her by his promise to pay the debt of a third person.

Second—Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol ; it must be in writing. The law is prohibitory and the court can not recognize any other proof to establish the fact. *Levy & Dieter v. DuBois et al*, 24 An. 401 ; *Merz v. Labuzan*, 23 An. 747.

In regard to the privilege which the plaintiffs assert, we find no foundation for it, in view of the facts disclosed in the record. It is well settled that material men have no privilege, if the contractor with whom they dealt had no privilege.

“ Mechanics, laborers, and furnishers of materials employed by one who has contracted for the erection of a building, are only entitled to the same privilege as the contractor, and when the contractor has failed to register his contract as required by law, those employed by him have no privilege.” *Allen, executor, v. Wills et al*, 4 An. 97 ; *Whitla v. Taylor*, 6 An. 480 ; 16 An. 127 ; Revised Code, 2772, 2773, 2775.

The contract between Mrs. Pagaud and S. B. Allison, the contractor, was not recorded. The registry of the acknowledged account of plaintiffs against Allison did not give them a privilege on the property of Mrs. Pagaud ; at most it only entitled them to such privilege as Allison might have. Having failed to record his contract, Allison had none. Consequently the plaintiffs have none.

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Whatever sum Mrs. Pagaud may have in her hands, due on her contract with Allison, after deducting the amount expended by her to complete the building, belongs to Allison; and it certainly can not be distributed among his creditors in this proceeding, because Allison is not a party. The plaintiffs, who are creditors of Allison, have shown no authority from him to collect from Mrs. Pagaud whatever sum she may owe him on a final settlement. Assuming that she owes Allison the sum the plaintiffs insists is due by her to him, still Allison appears to be a necessary party, contradictorily with whom the settlement should be made.

It is therefore ordered that the judgment herein be annulled, and it is further ordered that there be judgment for the appellant, plaintiffs paying costs of both courts.

Rehearing refused.

No. 5071.

SUCCESSION OF ANTOINE DECUIR—MRS. JOSEPHINE DECUIR, Administratrix v. LEON FERRIER et als.

By the judgment homologating the final account and tableau of her administration, the administratrix, plaintiff in this case, was discharged from her trust. Therefore, if that judgment be not utterly null, she, as administratrix, has no standing in court.

The evidence in the record shows that the attorneys who filed the account [were employed by her and that they were authorized to act in the premises.

Besides, more than twelve months had elapsed from the rendition of the judgment homologating the account, when this suit in nullity was instituted.

The administratrix can not be listened to, when urging her own laches in having the account homologated before the account and tableau had been advertised ten days, in order to gain an advantage individually.

APPEAL from the Parish Court, parish of Pointe Coupee. *Bouanchaud, J. E. K. Washington* and *S. B. Snaer*, for plaintiff and appellant. *Edward Phillips*, for defendants and appellees.

LUDELING, C. J. This suit was instituted by Mrs. Decuir, as administratrix of Antoine Decuir, deceased, to annul a judgment of the parish court, homologating *her* final account and tableau of distribution of said succession. The grounds upon which she bases her action are, that she did not sign the tableau, and that Messrs. Haralson & Claiborne, attorneys, who filed the account and tableau, had no authority to do so; that the tableau is not correct; that the account and tableau were not advertised according to law; and that she individually is a privileged creditor, but her claim was utterly ignored.

The following were urged as exceptions to the action; that the petition shows no right or cause of action; that the administratrix of the said succession has no interest in this suit and no right to stand in judgment; that the action in nullity is barred by the lapse of one year, and the prescription of one year is pleaded.

Succession of Decuir.

By the judgment homologating the final account and tableau aforesaid, the administratrix was discharged from her trust. Therefore, if that judgment be not utterly null, she, as administratrix, has no standing in court. 20 An. 35; 23 An. 178.

The evidence in the record satisfies us that the attorneys who filed the account were employed by her, and that they were authorized to act in the premises.

Besides, more than twelve months had elapsed from the rendition of the judgment homologating the account, when this suit was instituted.

She can not be listened to when urging her own laches in having the account homologated before the account and tableau had been advertised ten days, in order to gain an advantage individually.

It is therefore ordered and adjudged, that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 4662.

F. B. FLEITAS v. CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA et als.

The main question in this case is, whether a plantation having been sold at the suit of a first mortgagee, the rights of subsequent mortgagees are transferred by the sale to the proceeds—said mortgages no longer subsisting. The decision of the controversy depends on the interpretation to be given to a clause in the *concordat* between certain debtors and their mortgage creditors of superior and inferior rank.

This court thinks that said clause, which is recited at full length in the judgment, did not bind Mrs. Crozat, one of the first class creditors, in case of her foreclosing her mortgage, to cause the property to be sold at one, two and three years, for the reason that her mortgage was not novated, that her note was not identified with the *concordat*, and that she could not proceed under it to enforce her mortgage rights. Her purpose, in becoming a party to the *concordat*, was simply to give certain debtors an opportunity to pay their debts to their creditors by suspending the enforcement of her mortgage to a given time, provided the interest on her claim was punctually paid. The failure to pay this interest, which was made the express condition of her agreement to the delay, released her from the obligation of said contract, and restored her to her full rights under her own act of mortgage.

Mrs. Crozat did not expressly consent in the *concordat*, to enforce her first mortgage under the stipulations of that second act, and it is not to be presumed that she gave up more of her rights than were clearly and distinctively waived or relinquished. This act is to be construed liberally in her favor, as no one is presumed to give. She had therefore the right to seize and sell as she did. The sale and adjudication to the plaintiff having been legally made, and the price absorbed by the first and second mortgages, those created in favor of the third mortgagees are properly canceled, and the plaintiff can not be disturbed in the rights he has acquired.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. W. W. King, Semmes & Mott*, for plaintiff and appellee. *E. Bermudez, E. W. Huntington and P. Capdeville*, for defendants and appellants; *A. Pitot*, for Mrs. Cruzat.

HOWELL, J. The plaintiff alleges that he purchased a certain plant-

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ation in the parish of St. Bernard at sheriff's sale under executory process issued on a first mortgage, and that all other mortgages were canceled according to law; but the defendants have since asserted a subsequent mortgage as still subsisting, and have taken the initiatory steps to issue executory process on the same, thus casting a cloud on his title, impaired his credit as owner, and caused him damage.

He prays that they be enjoined from suing out any writ of seizure and sale on their said pretended mortgage, and seizing his plantation, and also from asserting any right upon the same resulting from their said act of mortgage, and that they be condemned to pay damages.

The defendants filed exceptions to the jurisdiction, *lis pendens*, no cause of action, and insufficiency of averments for an injunction, which were overruled below and are not urged before us.

The answer sets up the existence and reality of their claims and mortgage, the nullity of the sale and adjudication to plaintiff, because by express stipulation in their act of mortgage, which they designate as a *concordat* between their debtors and all the creditors including the first mortgagee, the said plantation could not be sold for cash, as was done, but should have been sold on a credit of one, two and three years, and the further averment that the adjudication to plaintiff was made by deception, and for a trifling amount compared with the real value, and what the plaintiff had offered a short time before; and the defendants pray that the injunction be dissolved with damages, the adjudication to plaintiff be annulled, and their mortgage be recognized and enforced upon the said plantation. They also asked that the first mortgageor and the common debtors be made parties to this suit. The first mortgageor excepted to being made a party to this litigation, and the exception being overruled, she filed an answer. There was a judgment perpetuating the injunction, declaring the rights of the subsequent mortgagees, are transferred by the sale to the proceeds and are no longer subsisting mortgages, from which the defendants appealed.

From the view we have taken of the case, and the questions presented by the principal parties, it is unnecessary to pass on the exceptions filed by the first mortgage creditor, under whose mortgage the sale to plaintiff was made.

The decision of the controversy depends on the interpretation of a clause of the *concordat* invoked by the defendants, as fixing the terms upon which the mortgaged property was to be sold—they contending that this stipulation applied to the first mortgage, while the plaintiff and Mrs. Crozat, the first mortgagee, contend that it applies only to the *concordat*, and that Mrs. Crozat expressly reserved all her mortgage rights, which she could enforce when the condition on which she became a party to the *concordat*, should fail or be violated.

The Villerés had two mortgage creditors, Mrs. Crozat and the succession of Olivier, whose claims bore eight per cent. interest, and several ordinary or chirographic creditors, the consolidated association and others. The above mortgage creditors will be designated as first, and the others as third mortgage creditors. Being unable to pay their debts, the Villerés entered into a *concordat* before Ducatel, notary, with all their creditors, by which they were to pay the first mortgagees only five per cent. interest annually, and the ordinary debts without interest in seven annual installments, for which they executed their notes, and a third mortgage on their plantation to secure the payment thereof. The mortgage claims of Mrs. Crozat and the succession of Olivier were to remain the same without reduction of the principal during the seven years upon the payment of the five per cent. annually. In case of nonpayment of even one of the notes thus furnished (to these third mortgagees), their creditors could seize the property thereby mortgaged and sell it for the whole of their claims, on a credit of one, two and three years, with eight per cent. interest from the day of sale, in notes secured by mortgage on the property sold, and divided into coupons among said creditors.

The five per cent interest was paid for several years, but on subsequent failure of such payment, Mrs. Crozat caused her mortgage, executed before Boudousquié, notary, to be foreclosed, and the plaintiff became the purchaser at a little over two-thirds of the appraised value of the property.

The clause of the *concordat* which has given rise to the dispute is as follows:

“The said Mr. Pierre Maspero, administrator of the succession of Mr. Cesaire Olivier, and the said Mrs. Widow Manuel Crozat do hereby declare, that in order to facilitate the said Messrs. Villeré and the said Mrs. Bodin in discharging themselves of their indebtedness to their creditors, they consent and acquiesce with all that is hereinbefore written, and to receive nothing during the said seven years, in deduction of the sums in principal due by mortgage to the succession of the said Cesaire Olivier, deceased, and to her, the said Mrs. Widow M. Crozat, but under the express condition that an annual interest of five per cent. upon said sums shall be paid to them, and that nothing in the present act shall be so construed as to prejudice in any manner their rights, privileges, mortgages, and actions resulting from the above described mortgage acts before Adolphe Boudousquié, which acts shall remain in full force and effect, without any derogation or innovation by virtue of these presents, except what has been hereinbefore stipulated in relation to the delays granted, and to the mode of sale in case of seizure, they reserving to themselves, in case of seizure and sale

before the expiration of the said seven years, the right of availing themselves of their rank of first mortgage creditors, to the extent of the sum of twelve thousand five hundred and ninety-seven dollars and twelve cents for the succession of Mr. Cesaire Olivier, and of six thousand dollars for Mrs. Widow Manuel Crozat."

The question is, did this bind Mrs. Crozat, in case of foreclosing her mortgage, to cause the property to be sold on a credit of one, two and three years? We think not; for the reason that her mortgage was not novated and her note was not identified with the *concordat*, and she could not proceed under it to enforce her mortgage rights. Her purpose, in becoming a party to the *concordat*, was simply to give the Villerés an opportunity to pay their debts, by suspending the enforcement of her mortgage for a given time, provided the interest on her claim was punctually paid. The failure to pay this interest, which was made the express condition of her agreement to the delay, would release her from the obligation of the said contract, and restore her to her full rights under her own act of mortgage.

The exceptions made and on which the defendants rely, refers to the only modification of her mortgage rights caused or affected by the said act, to wit, the granting of the delay and the mode of sale provided for by the act. In no other respect was her mortgage to be affected, and this depended on the condition she imposed, to wit, the payment of the interest. The delay was given during which the chirographic creditors alone were to be paid the principal of their claims, and the mode of sale fixed was for their benefit, and to be resorted to by them alone, in case any one of their notes should not be paid. It was only their notes that were identified with the said act, the payment of which alone could be enforced under the said act, and a sale made under it (the said act) was to be made on the credit specified; and the first mortgage creditors would, at such sale, "have the right of availing themselves of their rank," that is, have the right to assert their rank of first mortgage creditors, and require the payment of their claims in full. But if they should have the occasion so to do, and determine to enforce their own mortgages, they could do so only upon and by virtue of the act, which created their mortgage, and without any regard to the stipulations of the *concordat*, as there was no necessary connection between the different acts of mortgage in favor of the two different classes of creditors. It might well have happened, in the course of events, that the debtors would have paid the five per cent. interest on the prior or first mortgages, and failed to pay the last mortgage creditors. Under the *concordat*, so long as this five per cent. interest was paid, the prior or first mortgage creditors had no right to sue or foreclose their mortgage. But if any one of the last mortgage creditors

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was not paid, he could proceed to sell, under the *concordat*, although the interest might be paid to the others; and in such contingency, the act (*concordat*) provided for the delay and terms on which the sale should be made under it, and the manner in which the prior mortgage rights would be preserved. This construction gives a reasonable interpretation and effect to every clause and portion of the act. As the sale did not take place under this last mortgage, the stipulations in it as to delays and terms of sale had no application to the case.

Mrs. Crozat did not expressly consent, in the *concordat*, to enforce her first mortgage under the stipulations of that act, and it is not to be presumed that she gave up more of her rights than were clearly and distinctly waived or relinquished. This act is to be construed liberally in her favor, as no one is easily presumed to give.

When the purpose and object of the *concordat* are considered, and all its stipulations, reservations and exceptions construed together, it is obvious, in our opinion, that Mrs. Crozat intended to be bound by any of its provisions, only on condition that the stipulated interest should be regularly paid, and that failing, she had the right to seize and sell as she did.

There is no evidence of deception or ill practices in the appraisement and sale of the property, and having been sold for two-thirds of the appraisement, we see no legal grounds for disturbing the adjudication; and the sale having been legally made, and the price being absorbed by the first and second mortgages, that in favor of the third mortgagees was properly canceled.

Judgment affirmed.

MORGAN, J., *dissenting*. The prayer of the petition in this case is that an injunction may issue prohibiting and restraining the defendants, and each of them, their and each of their agents and attorneys from procuring or suing out any writ of seizure and sale, or other writ or order of seizure based on the mortgage which is recited in the petition, and from seizing thereunder the plantation which the plaintiff claims to own; and that they be enjoined from asserting that they have any lien or mortgage on said property resulting from the act of mortgage aforesaid.

I do not think that a judge should have issued an injunction upon such a prayer. I understand that the courts of the State are open to all litigants who desire to assert their rights, and I do not understand, nor have I been informed, that there is any law in Louisiana which prevents a lawyer from bringing a suit for the protection of his clients' interests. Here the door of justice is absolutely closed against the defendants, and their counsel's lips are sealed.

I think it would have been time enough for the plaintiff to have defended himself when he was attacked. As well might a tenant be allowed to injoin his landlord from collecting his rent, or the debtor of a promissory note injoin his creditor from suing him, or a furnisher of supplies which went to make a crop, from seizing the crop in order to secure his privilege.

Having issued the order, however, I think the judge should have maintained that portion of the exception filed by defendants, which specifically declared that the averments of the petition did not justify the issuing of the injunction which had been obtained, which exception I do not think was ever abandoned.

Coming to the merits, I think the case is equally clear for the defendants, in this, at least, that the injunction should have been dissolved. The Villerés (those I mean who are interested in this suit) had several creditors. They were divided into creditors with mortgage, of first and second rank, and chirographic creditors, and the mortgage creditors were also chirographic creditors. To pay their debts, which amounted to over \$64,000, they owned two adjoining plantations. Their creditors, desiring to secure themselves, and to give to their debtors an opportunity of acquitting themselves of their indebtedness, went before a notary public, on the fourteenth of December 1867, and accepted the proposition which had been made to them, viz: that a delay of seven years be granted them, from the twelfth January 1867, in which they were to pay their debts, but without interest, in instalments of one-seventh yearly, for which they were to give, and did give, their notes, secured by mortgage on their plantations. It was, however, expressly stipulated that the mortgage claims of Mrs. Manuel Crozat, and the succession of Mrs. Cesaire Olivier, amounting together to \$18,597 12, which were already secured by mortgage on the aforesaid plantations, should remain the same, without annual reduction of the capital, but should bear interest at the rate of five per cent. per annum, payable annually, during the term of seven years. It was further agreed that in case of nonpayment of even one of the notes thus furnished by the Villerés, their creditors were to have the right to sue for the reimbursement of the whole of their claims, and cause the property mortgaged to be sold in the manner following, to wit: one-fourth cash, and the balance at one, two and three years credit, with interest at the rate of eight per cent. per annum from the day of sale until final payment, in notes secured by mortgage on the property so sold, and divided into coupons, in order to facilitate the settlement with each of said creditors. And Pierre Maspero, representing the succession of Mr. Cesaire Olivier, and Mrs. Manuel Crozat specially declared that, in order to facilitate

the Villerés and Mrs. Bodin in discharging their indebtedness to their creditors, they consented and acquiesced in what had been done, and agreed to receive nothing during the seven years therein stipulated, in deduction of the principal due to them, under the express condition, however, that an annual interest of five per cent. upon the amount due them should be paid, and that nothing in the act should be so construed as to prejudice in any manner their rights, privileges, mortgages and actions resulting from the mortgage acts passed before Boudousquié, under which their rights as creditors were determined, which acts were to remain in full force and effect, without any derogation or innovation, except what had "been hereinbefore stipulated in relation to the delays granted, and to the mode of sale in case of seizure," they reserving to themselves, in case of seizure and sale before the expiration of the said seven years, the right of availing themselves of their rank of first mortgage creditors." Now it seems to me that the intent of this act, and the language in which the intention is expressed is not susceptible of two interpretations. In case their interest was not paid they might proceed under their rank of first mortgage creditors, but the sale was to take place under the delays granted, which were one, two and three years credit.

Now, this agreement between the parties, was a contract, binding equally upon all who had signed it, and was the law between them. Notwithstanding which Mrs. Crozat, on the twentieth December 1869, without having previously endeavored to have the contract annulled, and without notice to any of her co-creditors, applied for and obtained an order of seizure and sale against the property, the terms being cash. At the sale Fleitas became the purchaser. To these proceedings the defendant was not a party. In the answer filed, after the exception was overruled, it is averred that the illegal and improper practices by which the sale was made were well known to the plaintiff, and were a fraud upon defendant's rights, and a violation of their common act, all of which it is alleged was known to Fleitas.

Now, it is established that Mr. Fleitas knew of the act by which the creditors of the Villerés had agreed to the terms upon which their property should be sold in case they did not comply with their engagements. He consulted counsel upon the subject who only advised him that he could purchase with safety after having received the assurances of the counsel, who represented the subsequent mortgage creditors, that they would consent to the sale being made for cash.

That the entirely irreproachable counsel representing these creditors believed he was acting in behalf of the true interest of all parties concerned, and that he believed he was authorized to give the assurances he did, I do not for a moment question. But whether he was

I think it would have been time enough for the plaintiff to have defended himself when he was attacked. As well might a tenant be allowed to injoin his landlord from collecting his rent, or the debtor of a promissory note injoin his creditor from suing him, or a furnisher of supplies which went to make a crop, from seizing the crop in order to secure his privilege.

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That the entirely irreproachable counsel representing these creditors believed he was acting in behalf of the true interest of all parties concerned, and that he believed he was authorized to give the assurances he did, I do not for a moment question. But whether he was

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so authorized is another matter, and I think, from the record that he was mistaken. Under all the circumstances of the case it seems to me clear that the injunction should have been dissolved, and the defendants left free to pursue their rights in such form as the law authorizes. I therefore dissent from the opinion of the majority.

26	230
48	723
26	230
110	834
26	230
114	389
26	230
115	717
26	230
124	662

No. 5061.

O. K. HAWLEY, Public Administrator and his successor J. M. WELLS
v. CRESCENT CITY BANK et als.

The defendants in injunction took a bill of exceptions to the permission granted by the court *a qua* for an amended petition to be filed by the plaintiff on the ground that the suit being an injunction one, all the matters of law or fact that can justify the issuing of such process could and should only be alleged and pleaded in the original petition. The ruling of the court was correct. The amended petition contained only the plea of prescription which may be pleaded at any stage of the proceedings. The debts of the community during its existence are the debts of the husband. The property of the community is liable for the payment of them. Even more, the community property may be taken to pay debts of the husband contracted before the marriage. On the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts, is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal. Hence the community property justly comes under his control until the debts are paid. Before their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain until, by the result of the final discharge of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse. If the surviving husband has the right to control the community assets, and to administer them after his wife's death, so as to make *bona fide* settlements of its debts, he has equally the right to waive or omit specific defenses to suits and indisputable claims. If, through fraud used by a surviving husband in community to injure the heirs of the wife, he should sell or otherwise dispose of the community property, it would seem that they would have a remedy by the provisions of art. 2404 of the Civil Code. In this case the husband had by law the usufruct of the wife's half of the community property, consisting of the undivided half of the lands seized by the judgment creditors, no partition of the community property having been made. Nevertheless, without opposition on the part of the surviving husband, the public administrator came forth and administered on what he styled the estate of the deceased wife, and enjoined the sale of the community property seized by judgment creditors of the community, and which is subjected to the payment of their judgment. This proceeding is irregular and illegal, and the injunction must be dissolved with damages.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. M. Ryan and R. J. Bowman*, for plaintiffs and appellants. *Manning*, for defendants and appellees.

TALIAFERRO, J. This is an injunction suit. The Crescent City Bank and G. W. West having each a judgment against Whetty M. Sasser, issued executions and caused the undivided half of certain lands in the parish of Rapides to be seized by the sheriff. The public administrator enjoined the sale on the ground that the lands seized

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belonged to the succession of Mrs. Drucilla Sasser, and that the judgments upon which the executions issued were in no way binding upon her estate, her representative never having been made a party to the judgments. The administrator amended his petition and pleaded the prescription of five years against the note upon which the judgment of the Crescent City Bank was rendered. Subsequently Whetty M. Sasser died. The court dissolved the injunction without damages, and the administrator of Mrs. Sasser appealed.

The counsel for the defendants in injunction took a bill of exceptions to the permission granted by the court for an amended petition to be filed by the plaintiffs, the suit being an injunction suit, and all the matters of law or fact that can justify the issuing such process could and should be alleged and pleaded in the original petition. The amended petition was admitted. It contained only the plea of prescription, which may be pleaded at any stage of the proceedings. We think the ruling of the court correct. Civil Code art. 3464.

The facts of this case are that the community of acquets between Whetty M. Sasser and his wife Drucilla, was dissolved by the death of the latter in 1864. Their property was all community property. Mrs. Sasser, as it appears, did not bring anything into the marriage, and never acquired anything by inheritance or donation during the long existence of the community of thirty years. A large amount of property seems to have been accumulated by the community, and against it there was a large amount of debts. It appears that other judgment creditors of Sasser had, prior to the seizures made by the present defendants, seized under executions the lands belonging to the community, and their seizures were enjoined by the administrator to the extent of an undivided half, on the ground that it was the property of the succession of Drucilla Sasser; the other half was sold and the proceeds satisfied the executions. The undivided half seized by the defendants in this suit, the plaintiff alleges, as before stated, is the property of Drucilla Sasser's estate, under his administration as the public administrator of the parish.

The position assumed by the plaintiff's counsel is, that the husband does not represent the community after its dissolution, and the heirs must be joined with him in a suit to affect their interest, and cites 1 Rob. 378, where it is laid down that "the creditor who wishes to hold the heirs of the wife responsible for a community debt must join them in his suit against the husband, for the latter no longer represents a community which is at an end." The suit of the Crescent City Bank against Sasser was brought in 1867, four years after the death of his wife. The note sued on was due first of March, 1862, and petition and citation were served on the twenty-second of April, 1867. Sasser on

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the same day confessed judgment on the note, recognizing the mortgage as set forth in the petition. The other seizing creditor, West, obtained judgments against Sasser in 1865 and 1866.

It is argued that the husband has no power to create obligations against the community after its dissolution, and therefore his confession of judgment in the case of the Crescent City Bank has no effect against the heirs of Mrs. Sasser, for the authority to acknowledge a debt prescribed is equal to the authority to create a debt, referring to 1 An. 331. It is further contended that every debt of the community is a debt against the heirs of the wife, and these debts can not be fixed and adjudicated upon, without their being parties to the judicial proceedings which decree them; that the administrator of Mrs. Sasser having accepted her succession, it is bound for one-half the debts of the succession, and stands in relation to the bank claim as a joint debtor. Therefore it is held, her administrator has the right to plead prescription against it; that without citation or notice the judgment of the bank against Sasser is not *res adjudicata* as to her.

These views of the relations that exist between the heirs of a deceased wife in community and the creditors of that community are not, we apprehend, in consonance with the laws and the general jurisprudence on the subject. The debts of the community during its existence are the debts of the husband. The property of the community is liable for the payment of them. Even more, the community property may be taken to pay debts of the husband contracted before the marriage. 13 An. 396; 2 An. 226; 3 An. 615.

Upon the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts, is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal. This being his position, he has under his control the community property which by law is expressly subjected to the payment of the community debts; and he has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence; because he is, after the dissolution, under the same responsibilities for the community debts that he was before the dissolution. It is but just that he should have those powers. The community property continues under his control until the debts are paid. Until their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain, until by the result of the final discharge of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the de-

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ceased spouse. This doctrine has been uniformly recognized in our jurisprudence as appears from a long chain of decisions. Among the more recent cases we refer to 24 An. 534 and 543; 25 An. 379. We determined in a late case, *Baird v. The Heirs of Sprowl*, 23 An. 424, that "a judgment creditor of the surviving spouse may seize and sell an asset of the community in satisfaction of his demand, and the heirs of the deceased partner can not set up their residuary rights by way of injunction." In the case of *Rush v. Warren* 25 An. 314, we held that the surviving husband in community has the right to make *bona fide* settlements for the payment of debts of the community. If the surviving husband has the right to control the community assets, and to administer them after his wife's death, so as to make *bona fide* settlements of its debts, he has equally the right to waive or omit specific defenses to suits, and indisputable claims.

In the case under consideration, Sasser, before the dissolution of the community, would have had the undoubted right to waive prescription and confess judgment, in the case of the debt against the community held by the Crescent City Bank. His right to do so after the dissolution, we think continued.

If, through fraud used by a surviving husband in community to injure the heirs of the wife, he should sell or otherwise dispose of the community property, it would seem that they would have a remedy by the provisions of article 2404 of the Civil Code.

The proceedings in this case, we think, rather anomalous. When they were commenced, Sasser, the survivor in community, was living and unmarried. He had by law the usufruct of the wife's half of the community property, which consisted then of the undivided half of the lands seized by the judgment creditors, no partition of the community property ever having been made. Nevertheless, without opposition on the part of Sasser, the public administrator came forth and administers upon what he styles the estate of Drucilla Sasser, and enjoins the sale of the community property seized by judgment creditors of the community and which is subjected to the payment of their judgments.

We think the proceedings irregular and illegal. The defendants, in their answer, prayed a dissolution of the injunction and for damages. We conclude, from the character of this case, the judgment of the lower court should be amended by decreeing damages.

It is therefore ordered that the judgment appealed from be amended by decreeing that O. K. Hawley, administrator, plaintiff in this case, pay the defendants the sum of one hundred and fifty dollars as damages for the wrongful suing out of the injunction and all costs of suit, and as thus amended that the judgment be affirmed.

No. 5079.

HARRIET B. KELLOGG et als. v. J. V. DURALDE, Sheriff, et als.

Under no circumstances, according to our jurisprudence, can the plaintiffs recover any portion of the community property, sold for a community debt, without first paying or tendering the amount by which they have been benefited from the price thereof paid by the purchaser.

A PPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Posey, J. Fuqua & Callihan*, for plaintiffs and appellants. *Favrot & Lamon*, for defendants and appellees.

HOWELL, J. This is a third opposition filed by the children and heirs of Mrs. E. M. Woods, deceased, wife of James C. Woods, in which they claim to be the owners, by inheritance from their mother, of an undivided half of the property seized and advertised for sale, at the suit of J. W. Burbridge & Co. v. James C. Woods. They claim that their rights to said property were determined by judgment in January, 1863, against their father, James C. Woods, and they ask, if the sale is persisted in by Burbridge & Co., it be annulled as to their said half.

Burbridge & Co. filed peremptory exceptions to the action of plaintiffs; that by averments and judgment in their suit they have accepted purely and simply the succession of their mother and made themselves responsible for the debts of the community, including that due exceptors, for which they obtained judgment in the sum of \$18,138 20 with recognition of mortgage for \$12,000, dating from nineteenth of April 1855, in which the mother of plaintiffs intervened and renounced; that they can not recover until they refund the prices applied to their debt; further, that at the sale of the property in question, the exceptors bought the same for \$3648, which *pro tanto* was applied to the extinguishment of a debt due by the community, and that before plaintiffs can recover the half of said property they must pay or tender the sum by which they are thus benefited, and further that plaintiffs' suit is an indirect attempt to attack collaterally exceptors' judgment against James C. Woods, which is final and executory.

These exceptions were referred to the merits, and after answer filed, judgment was rendered dismissing the claim of third opponents and sustaining the sale to Burbridge & Co., from which the plaintiffs appealed.

The evidence seems very clear that at least the sum of \$5269 87, the balance due to Burbridge & Co., on nineteenth April 1859, succeeding the death of Mrs. Woods, was a debt of the community which has never been settled, and that since that date the said indebtedness has not decreased, but has increased to about \$18,000 under the management of the surviving spouse and usufructuary, and under no

Harriet B. Kellogg et al. v. Duralde, Sheriff, et al.

circumstances, according to our jurisprudence, can the plaintiffs recover any portion of the community property, sold for a community debt, without first paying or tendering the amount by which they have been benefited from the price thereof, paid by the purchaser. See 19 An. 508; 21 An. 383; 23 An. 424; 24 An. 324, 534; 25 An. 314, 379.

The pleadings and facts of the record, however, make it appear that their rights in this respect ought to be reserved.

It is therefore ordered that the judgment appealed from be amended by reserving plaintiffs' right to assert their claim, if any they have, in a further action, and as thus amended it be affirmed. Costs of appeal to be paid by appellees.

Rehearing refused.

No. 3070.

SAMUEL SNODGRASS v. THOMAS A. ADAMS.

Whether Hatch, the United States collector of customs at the port of New Orleans, continued after secession to act in the same capacity as before, or whether he became collector of customs for the Confederate States, it is not important to decide in this case, as in either event the payment of duties to him should protect from seizure the property on which the duties were paid.

If Hatch had ceased to represent the Government of the United States and represented the Confederate States, the payment should protect the property, as it was made to the representative of a power which had the ability to enforce its demands, and which the United States, for the time being, were unable to resist.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J.* *George L. Bright* and *A. De B. Hughes*, for plaintiff and appellee. *M. M. Cohen*, for defendant and appellant.

LUDELING, C. J. This suit is for a partial rescission of a sale and to recover the sum paid for the property, of which the plaintiff says he was evicted.

It appears that on the seventh of February, 1862, the plaintiff bought from the defendant 375 rolls or 45,000 yards of India bagging.

This bagging was shipped from Calcutta to New Orleans on the ship *Judith*; the ship stranded on the coast of Cuba, in February 1861, and the cargo was abandoned to the insurance companies that had insured the property. The defendant, as the agent of said companies, paid the duties on the bagging when it was brought to New Orleans in May 1861, and in February 1862 he sold the bagging to the defendant.

The duties were paid to Mr. F. Hatch, who was the United States collector of customs at New Orleans when the ordinance of secession was adopted in Louisiana, and who continued to act under the authority of the State of Louisiana, and afterwards under that of the Confederate States.

The plaintiff withdrew from the bonded warehouse 30,600 yards of

 Snodgrass v. Adams.

the bagging and sold it, and permitted 14,400 yards to remain in the warehouse until the Federal forces took possession of New Orleans, and the bagging of the plaintiff, undisposed of by him, was seized, as he alleges.

Whether Mr. Hatch continued to be the United States collector of customs after secession, or whether he was the collector of customs for the Confederate States, it is not important to decide, as in either event, we think, the payment of the duties should protect the property from seizure. If he had ceased to represent the Government of the United States and represented the Confederate States, the payment should protect the property, as it was made to the representative of a power, which had the ability to enforce its demands, and which the United States, for the time being, was unable to resist. *Thorington v. Smith*, 8 Wallace 10; *United States v. Thomas*, 16 Wallace —, and *United States v. Rice*, 4 Wheat. 250.

This view of the case renders it unnecessary to decide, whether or not there was warranty against eviction on account of nonpayment of duties, and whether or not the consideration of the contract was confederate money. The plea in reconvention is not well founded. It is therefore ordered and adjudged, that the judgment of the lower court be avoided, and that there be judgment in favor of the defendant and against the plaintiff, rejecting his demand with costs in both courts.

Rehearing refused.

 No. 5092.

MARY HARDY, for the use of her Child, v. JOHN E. STEVENSON.

The plaintiff sues to have defendant declared the father of her illegitimate child and to have him condemned to pay a certain sum for alimony to said child. One of the pleas of the defense is *res judicata*. There was a previous suit between the same parties for the same cause of action in the Fourth District Court, parish of Orleans, with the exception that, in said suit, the plaintiff had also claimed damages on the ground of injury done to her character and reputation by seduction. There was judgment, on the twenty-eighth of February, 1872, dismissing the claim of the minor child for alimony; and, on the next day, twenty-ninth of February, the claim of the mother for damages having come to trial before a jury, was dismissed on motion of her own counsel. The order of the twenty-eighth of February, dismissing the minor's claim for alimony, was not entered on the minutes through clerical error, and in May following, on motion of defendant contradictorily with plaintiff, said judgment against the minor was entered *nunc pro tunc*. The court *a quo* had the power to make this correction of the minutes, and to cause the judgment to be properly entered, as was done. It follows that the plea of *res judicata* must be sustained.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
Cole, J. Barrow & Pope, for plaintiff and appellant; *Breaux, Fenner & Hall*, for defendant and appellee.

TALIAFERRO, J. The plaintiff alleging the defendant to be the

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father of her illegitimate daughter, and that both the mother and daughter are without means for the support and education of the latter, sues the defendant in this action to have the daughter declared the illegitimate child of the defendant, and that he be condemned to pay alimony for her use at the rate of three hundred dollars, from the thirtieth of May, 1869, so long as her circumstances may require it. The defendant filed the plea of *res judicata*, and that failing, he further excepts peremptorily that the plaintiff can not recover alimony for the reason that, even if her allegations were true, which he denies, the daughter would be an adulterous bastard, as the defendant is a married man and was so at the time of the alleged intercourse with the alleged mother of said minor. He prays judgment in his favor and for general relief, etc.

The court *a qua* sustained the plea of *res judicata* and dismissed the suit.

The plaintiff appealed.

The facts as we find them from the evidence are that, on the sixth of August, 1869, the plaintiff filed a suit in the Fourth District Court, parish of Orleans, against the defendant for the same cause of action as set forth in the present suit, commenced in May, 1873, viz: for alimony for her child. In the first suit, however, she also prayed judgment on her own account for a large sum in damages arising from loss of character sustained by falling a victim to the arts and seduction of the defendant. In the original suit the defendant answered by general denial, and specially excepted to that part of the plaintiff's petition which claimed alimony for the minor, on the same grounds that he now excepts in his suit. On the twenty-eighth of February, 1872, judgment was rendered on the exception sustaining it, and decreeing in favor of defendant, dismissing the claim of the minor child. On the next day, the defendant filed the plea of prescription in bar of the plaintiff's claim on her individual account for damages. It appears from the minutes of the court that on the twenty-ninth of February, 1872, the case came on for trial and that a jury was empanelled for the purpose. At that juncture the plaintiff's counsel presented papers addressed to them requesting that the suit be dismissed, which, on motion, was accordingly ordered by the court.

In May following, after this order discontinuing the suit was rendered on the twenty-ninth of February preceding, the defendant filed a motion to have the judgment entered on the minutes, that had been rendered on the exception to that part of the petition praying alimony for the minor, and which had been rendered on the twenty-eighth of February, 1872, of which, however, at the time of filing this motion (on the seventeenth of May, 1872), no entry had been made on the

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minutes. Notice of this motion was given to the plaintiff's counsel. On the twenty-fourth of May, trial was had on the motion and the court ordered that the judgment rendered in the case on the twenty-eighth of February, 1872, omitted through clerical error from the minutes of that day, be now entered *nunc pro tunc*.

The legal effect of this judgment is the prominent inquiry in this case. It is contended on the part of the defendant that the suit brought against him contains two distinct and separate demands independent of each other; that these demands might have been set up in two separate actions but were capable of being made the object of one suit; that a separate judgment might be rendered on each demand; that the omission of the clerk to enter upon his minutes of the twenty-eighth of February the judgment rendered on that day on the exception to the minor's claim, was a mere oversight and error, which the court had the authority afterwards to correct; that the subsequent judgment of dismissal had no bearing upon the judgment on the exception, and in no manner affected its validity. On the other hand, it is held that the action brought by the plaintiff against the defendant although containing two separate demands, is nevertheless but one action, one suit, and must be considered in its entirety; that the judgment said to have been rendered on the exception, formed only one proceeding in the case; that no entry upon the minutes of the court up to the twenty-ninth of February, the day the suit was dismissed, showed that any judgment had been rendered upon the exception. The suit was dismissed on the twenty-ninth of February; there was then an end of the case; it no longer existed; there was no such case on the docket of the court. Therefore, it is argued, that on the twenty-fourth of May, nearly three months after the suit was dismissed, the order rendered to enter upon the minutes of the court a judgment said to have been taken on the twenty-eighth of February, is a nullity, for the reason that the judge could render no order nor take any action whatever in a case, not in court. He could not proceed to adjudicate upon matters no longer before him.

We think the court had the power to render the order *nunc pro tunc* on the seventeenth of May, making the proper correction of the minutes, and to cause the judgment sustaining the exception and dismissing the claim for alimony rendered on the twenty-eighth of February preceding, to be entered as of that date.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

Rehearing refused.

Mrs. Evelyn M. May v. Ogden and Stansbrough, Executors.

No. 5104.

MRS. EVELYNE M. MAY, wife et al., v. OGDEN AND STANSBROUGH,
Executors.

The question in this instance is, whether the plaintiffs, as the particular joint legatees of the Hapaca plantation, are entitled to the revenues thereof from February, 1867, to the time of its delivery to the said legatees in September, 1873.

The second clause of article 1626, R. C. C., provides that "the particular Legatee can take possession of the thing bequeathed, or claim the proceeds or delivery thereof, only from the day the demand for the delivery was formed, according to the order herein before established, or from the day on which that delivery was voluntarily granted to him."

It is admitted in this case that there is no express bequest of the revenues accruing prior to delivery; that no judicial demand was made for the delivery; and that no corporeal delivery was made until September, 1873; but plaintiffs rely on what they call a constructive delivery by the executors. Even if it were conceded that a constructive delivery can be made by executors, it is on record that by a special agreement with plaintiffs, the right to claim such constructive delivery was waived by said plaintiffs. It follows that under the provisions of the above cited article of the R. C. C., the revenues of the Hapaca plantation accruing before delivery, can not be successfully claimed by plaintiffs.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. B. D. Farrar & H. H. Farrar*, for plaintiffs and appellants. *Mayo & Spencer*, for defendants and appellees.

HOWELL, J. This is a controversy between the executors of the last will of John Perkins, Sr., and two of the legatees under said will, in which the following two questions as stated by plaintiffs' counsel, are involved, to wit:

First—The right of Mrs. Evelyn M. Perkins and Miss Evelyn Bailey, as the particular joint legatees of the "Hapaca plantation," to the revenues thereof from February, 1867, to the time of its delivery to the said legatees in September, 1873.

Second—The right of Mrs. Evelyn Perkins to an amount of \$2000 a year for ten years, to date from the testator's death, which occurred on fifteenth of December, 1866.

The portions of the will (dated eleventh of June, 1866) directly involved, are the following:

"V. I hereby give, devise and bequeath to Mrs. Evelyn M. Perkins, my daughter-in-law, and to her daughter, Miss Evelyn Bailey, and the whole to either surviving the other, at my death, all that portion of the northwest corner of my Somerset estate, situated on Mill and Palmyra or Vidal Bayous, known as the Hapaca place, and now in lease-hold possession of Mr. Nolan, together with all the past and present due from said Nolan—said Hapaca being estimated at about two thousand acres.

"XX. * * * * * That my executors shall have the management and control thereof (all the estate), until all my debts are paid and the legacies fully discharged, and that delivery shall be made to

Mrs. Evelyne M. May v. Ogden and Stansbrough, Executors.

the legatees of the particular property devised and bequeathed to them as soon after my death as practicable. * * * * *

“*Codicil Second—I.* Whereas in my said will I devised the Hapaca place, containing about two thousand acres, to my daughter-in-law, Mrs. Evelyne Perkins, I now impose as a condition of said devise that neither ferryboat nor bridge, from the mouth of Mill Bayou down its stream, shall be allowed or be permitted to be erected or established, if it can be legally prevented. I also give and bequeath to the said Mrs. Evelyne M. Perkins, in addition to what is devised and bequeathed to her in my said will, the sum of \$2000, to be paid to her annually for ten years, and to be a charge upon the Somerset estate—the Hapaca place being under lease which will not terminate until the end of that period.”

In other clauses of the will and codicils, the testator made many legacies of particular sums of money, some of which were imposed on the “Somerset estate,” in Louisiana, described in the will as containing (including the “Hapaca place”) seventeen thousand four hundred acres, some on the “Oaks,” the testator’s residence in Mississippi, and some not specially on any property. After the date of the will, and prior to the death of the testator, the lease to Nolan was canceled, and the rents, or a large portion thereof due by him, were relinquished or remitted.

The executors are of opinion that Mrs. Perkins is entitled to either the rents or the annuity, but not to both. They insist that, upon a proper construction of the will, she is entitled only to the annuity, and of this opinion was the judge *a quo*, from whose decree the plaintiffs have appealed.

There seems to be no serious contest as to the annuity which was adjudged to Mrs. Perkins, and we have only to determine whether or not she and her daughter are entitled to the revenues or rents of the “Hapaca place,” bequeathed to them prior to its actual delivery.

The second clause of article 1626, R. C. C., provides that “the particular legatee can take possession of the thing bequeathed, or claim the proceeds or delivery thereof, only from the day the demand for the delivery was formed, according to the order hereinbefore established, or from the day on which that delivery was voluntarily granted to him.”

It is admitted that there is no express bequest of the revenues accruing prior to delivery, that no judicial demand was made for the delivery, and that no corporeal delivery was made until September, 1873; but it is contended on behalf of plaintiffs that there was a constructive delivery by the executors, resulting from their payment of the net revenues for several years.

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In answer to this the executors invoke a notarial agreement, dated twenty-seventh of August, 1873, between themselves and the legatees, by which the delivery was made upon the terms and conditions, "that the nature and extent of the rights of said legatees to the said revenues and annuity shall be left to a judicial decision in an amicable suit brought by said legatees for that purpose; and should the courts decide that said legatees are entitled to the said revenues, the amount of which is above fixed, or part thereof, then the payment already made as aforesaid shall be imputed thereto up to the amount, and any surplus of said payments shall be imputed to said annuity, in the event the court decides the said annuity to be due; and should it be decided that said legatees are not entitled to said revenues in whole or in part, but are entitled to said annuity, then the amounts so paid by the executors shall be imputed to the extinction of said annuity."

This clearly reserves the question of plaintiffs' right to the revenues, and waives any claim as to a constructive delivery from the payments as made by the executors, admitting that a constructive delivery can be made by executors. It follows, we think, that the provisions of the above article must apply, and that the revenues accruing before delivery can not be successfully claimed by the plaintiffs. This conclusion is supported by the terms and clauses of the will and codicils when construed together, and the further fact that the donation of the "Somerset estate," including this particular land, by the testator to John Perkins, Jr., was not finally revoked until in April, 1871. There are money legacies imposed by the testator upon the "Somerset estate" in general terms, and the "Somerset estate" is described by him as including the plantation bequeathed to the plaintiffs. The revenues of the whole estate were required to discharge those legacies, as those from the part so bequeathed to plaintiffs were not expressly exempted. And the legal title of the whole being in John Perkins, Jr., until judicially revoked in 1871, the delivery could not have been made to the plaintiffs prior thereto. We think the District Judge decided correctly.

Judgment affirmed.

Rehearing refused.

Mrs. Lydia A. Hardie v. St. Louis Mutual Life Insurance Company.

No. 2987.

MRS. LYDIA A. HARDIE v. ST. LOUIS MUTUAL LIFE INSURANCE COMPANY.

Where the life policy of insurance contained the following clause: "This policy shall not be binding on the company, until countersigned by J. R. Purvis, agent, of New Orleans, Louisiana, and the advance premium paid," and where before the policy was received by the agent at New Orleans, John W. Hardie, the person intended to be insured, died; Held—That the premium never having been paid, and the policy never countersigned by J. R. Purvis, the agent, or delivered to the assured or his representative, the plaintiff can not recover.

The obligation contracted by the company was a suspensive conditional obligation, depending upon future and uncertain events which have not happened.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Breaux, Fenner & Hall, Randolph, Singleton & Browne*, for plaintiff and appellee. *E. T. Merrick, Race & Foster*, for defendant and appellant.

LUDELING, C. J. On the fourteenth day of September, 1867, John W. Hardie made application to the agent of the St. Louis Mutual Insurance Company, at New Orleans, to insure his life. The application contains the following clause: "Also, that the policy of assurance hereby applied for shall not be binding upon this company, until the first premium, as stated therein, shall be received by said company, or some authorized agent thereof, during the life time of the person whose life is therein assured, such person being still in good assurable condition."

This application was forwarded to the company at St. Louis for acceptance. It was accepted, and a policy was sent to the agent at New Orleans. This policy contains the following clause: "This policy shall not be binding on the company, until countersigned by J. R. Purvis, agent, of New Orleans, Louisiana, and the advance premium paid." Before the policy was received by the agent at New Orleans, John W. Hardie died.

The premium never was paid, nor was the policy countersigned by J. R. Purvis, the agent, or delivered to the assured or his representatives.

The obligation contracted by the company was a suspensive conditional obligation, depending upon future and uncertain events which have not happened. C. C. 2045.

Having come to this conclusion, after having given full effect to the oral evidence in the record, we deem it unnecessary to pass upon the bills of exception in the record.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant and against the plaintiff rejecting her demand, with costs of both courts.

Rehearing refused.

Clements, President of the Police Jury of the parish of Rapides, v. Blossat et als.

No. 5059.

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48 256

**JOHN CLEMENTS, President of the Police Jury of the Parish of Rapides,
v. EUGENE R. BLOSSAT et als.**

The plaintiff has sued Eugene R. Blossat, parish treasurer, and the sureties on his official bond for a certain amount of school funds, and has sought to enforce a legal mortgage for said amount against their property.

The suit being on the bond of the parish treasurer, the prescription of five years pleaded in this court is not applicable.

As the bond was recorded in the bond book, but not also in the mortgage book in the recorder's office of the parish of Rapides, it did not operate as a mortgage on the property of the defendants, the principal and the sureties on said official bond.

The delay of one, two and three months allowed to the delinquent parish treasurer, to pay over a certain amount of the school funds, was a mere indulgence, and it did not have the effect of discharging the sureties on his official bond, whose undertaking was to be security that he should account for and pay over all school funds coming into his hands as parish treasurer.

Besides, the school board had no authority to make a contract having directly or indirectly for its object the discharge of the sureties on the bond of the parish treasurer.

Furthermore, there was no consideration for the delay granted, and as a contract it was not obligatory.

The court *a qua* did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278, by reason of a voucher showing the fact. The voucher was the best evidence and should have been produced.

There is no force in the objection that the official bond covered the acts of the treasurer only for two years. The funds in question came into the possession of Blossat while he was parish treasurer, and the sureties on his official bond are responsible on account of his failure to pay over the same, regardless of the fact whether his term of office has ceased or not. The conclusion is that the sureties are solidarily bound.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
A Orsborn, J. Robert P. Hunter, District Attorney pro tem., for plaintiff and appellant. **M. Ryan,** for Blossat. **T. C. Manning,** for sureties, defendants and appellees.

WYLY, J. The plaintiff sued Eugene R. Blossat, parish treasurer, and the sureties on his official bond, for \$12,059 80, school funds, and sought to enforce a legal mortgage for said amount against their property. The court, however, refused to recognize the mortgage, rejected the demand against the sureties, and gave judgment against Blossat, the delinquent treasurer, for \$1419 70. From this judgment the plaintiff appealed.

As the defendant, Blossat, has neither appealed nor joined in plaintiff's appeal, praying for a reduction of the judgment, his suggestion in his brief that there should be a further credit on the claim against him of \$278, will not be noticed. The inquiry is not whether the judgment shall be reduced, but whether it shall be enlarged conformably to the pretensions of the appellant.

The suit being on the bond of the parish treasurer, the prescription of five years pleaded in this court is not applicable.

As the bond was recorded in the bond book, but not also in the mortgage book in the recorder's office of the parish of Rapides, it did

Clements, President of the Police Jury of the parish of Rapides, v. Biossat et als.

not operate as a mortgage on the property of the defendants, the principal and the sureties on said official bond.

The appellant concedes that the amount of the judgment (\$1419 70) is all that is due him by Biossat, but he contends that the sureties on the bond should be condemned solidarily for said amount.

The sureties, however, insist that they are discharged from responsibility on the bond, because in the settlement of their principal with the school board in 1871 an extension of time was granted him to pay the balance found to be due, without their assent thereto. It appears that at the settlement in September, 1871, the board found there was a balance of \$1687 10 due by Biossat, the treasurer, "which amount he agrees to pay over to the school board in three installments, on fifteenth October, November and December, 1871, the whole of which was accepted by the board."

We think this delay of one, two and three months allowed to the delinquent parish treasurer, was a mere indulgence, and it did not have the effect to discharge the sureties on his official bond, whose undertaking was to be security that Biossat would account for and pay over all school funds coming into his hands as parish treasurer. Besides, the school board had no authority to make a contract having directly or indirectly for its object the discharge of the sureties on the bond of the parish treasurer; they had authority to collect the school fund from him, but while the fund remained in his hands the school board could not exonerate from responsibility on account thereof either the treasurer or his sureties.

Furthermore, it will be observed there was no consideration for the delay granted, and as a contract it was not obligatory. We think the court did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278, by reason of a voucher showing the fact. The voucher was the best evidence. The bill of exceptions to this ruling was not well taken.

There is no force in the objection that the official bond covered the acts of the treasurer only for two years. The funds in question came into the possession of Biossat while he was parish treasurer, and the sureties on his official bond are responsible on account of his failure to pay over the same, regardless of the fact whether his term of office has ceased or not. Our conclusion is that the sureties are solidarily bound.

It is therefore ordered that judgment herein be amended so as to condemn the sureties, Louis E. Texada, Joseph W. Texada and James R. Andrews *in solido*, for the amount of the judgment herein rendered against the defendant, Eugene R. Biossat, and as thus amended let the judgment appealed from be affirmed, appellees paying costs of appeal.

Rehearing refused.

James v. Breaux, Sheriff, et als.

No. 5009.

WILLIAM G. JAMES v. JOHN E. BREAUx, Sheriff, et als.

The plaintiff, a mere mortgagee, had no right to injoin the sale of the plantation of Bovard under executions in favor of a number of creditors of said Bovard, on the grounds substantially that the sheriff was proceeding irregularly and illegally in making said sale. If the sale be null for illegality, it can not affect his rights; and if the sale be valid, his remedy would be by third opposition to claim the proceeds of the sale.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J. Edward Phillips*, for plaintiff and appellant. *T. Yoist*, for defendants and appellees.

LUDELING, C. J. The plaintiff, claiming to have a mortgage upon the plantation of R. D. Bovard, enjoined the sale of the plantation and mules, carts, implements, etc., under executions in favor of a number of creditors of Bovard, on the grounds substantially that the sheriff was proceeding irregularly and illegally in making said sales. The judge *a quo* dissolved the injunction and the plaintiff has appealed.

We do not feel called on in this suit to decide whether or not a sugar plantation can be subdivided and sold, in accordance with the provisions of the statute enacted to carry into effect article 132 of the constitution. The plaintiff, a mere mortgagee, has no right to injoin the sale for such a cause. If the sale be null for illegality it can not affect his rights; and if the sale be valid, his remedy would be by third opposition to claim the proceeds of the sale. This court is burdened with too much business to undertake to decide hypothetical questions, however refined or interesting they may be.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 3067.

CHARLES E. ALTER v. JOHN McDUGAL et als.

The written acknowledgment of a debt need not be stamped before it can be received in evidence.

In this instance, the note described in the act acknowledging the indebtedness, and interrupting prescription as alleged, is not sufficiently identified as the one sued upon—which it was incumbent on the plaintiff to show. It was his duty to make out his case positively and he has not done so.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. W. W. King and Gustavus Schmidt*, for plaintiff and appellee. *T. J. Semmes*, for defendants and appellants.

MORGAN, J. This is a suit on a promissory note. The defense is a general denial, and the prescription of five years.

Alter v. McDougal et al.

Defendants objected to the introduction of the document B, signed by B. Arlington, Bennett & Co., in liquidation, per R. L. Arlington, dated sixteenth October, 1866, which acknowledges the indebtedness, and thus interrupts prescription, on the ground that the United States revenue stamp was not affixed thereto. We do not consider that the written acknowledgment of a debt must be stamped before it can be received in evidence. The opinion to which we have arrived upon another branch of the case renders it unnecessary for us to consider the other bills of exception.

The note described in the acknowledgment (B) is not identified as the note which is sued on. The note described in that document is said to be a note due on the first and fourth December, 1861, the date of the making of the note not being given, while the note sued on is dated fourth December, 1861, and is payable six months after date, say fourth June, 1862, and there is nothing in the record, except that the sum mentioned in each note is the same, to identify the one with the other. This we think it was incumbent upon the plaintiff to show. It was his duty to make out his case positively, and he has not done so.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of the defendants as in case of non-suit, plaintiff to pay the costs in both courts.

Rehearing refused.

No. 2962.

JOHN S. WALLIS v. E. B. WHEELOCK.

In March, 1862, plaintiff and defendant entered into a partnership by written agreement to transact an importing business, principally between certain ports in Europe and the Island of Cuba, the profits and losses to be equally divided between them. The partnership was to be continued during the year, and went into operation according to agreement. After the war, Wallis sues for one-half of a certain amount of partnership property remaining in the hands of defendant. The defense is that the contract was entered into with the view of running the blockade, and is therefore null and void, its object being an illicit one.

This court sees nothing illicit in the contract itself, and does not think that the defendant has shown that the partnership funds which came into his hands were the result of an unlawful traffic.

A PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Clarke & Bayne*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendant and appellant.

MORGAN, J. In March, 1862, plaintiff and defendant entered into a partnership, the object of which was, according to their written agreement, "to transact an importing business, principally between ports in Europe and the Island of Cuba." The partnership was to continue

Wallis v. Wheelock.

"during the war." They each contributed \$32,538 94, and the profits and losses were to be divided equally between them. They appointed Charles Howard their agent, who went to Cuba and carried on their business. After the war Howard turned over to Wheelock over eight thousand dollars of the partnership property. Wallis sues him for his half. His answer is that the contract was entered into with the view of running the blockade; that this object was an illicit one, and is therefore null and void.

We see nothing illicit in the contract itself, and we do not think the defendant has shown that the funds which came into his hands was the result of any unlawful traffic. Having partnership funds in his hands, he is bound to give to his partner the portion which he is entitled to under their contract.

Judgment affirmed.

Rehearing refused.

No. 3034.

**W. B. TAYLOR v. TWENTY-FIVE BALES OF COTTON and BLAKEMORE,
WOOLDRIDGE & Co.**

In the State of Mississippi a sale of personal property is complete by the mere consent of the parties and without delivery.

The cotton claimed in this case appears to have been made on Langley's place, and Tribble was to have an interest in the crop for his services—which interest was to be ascertained by arbitration. Before the arbitration Langley sold to the plaintiff. That sale vested the title to the cotton in Taylor, the plaintiff, and the attempt of the agents of Tribble to sell to the defendants was null, being the sale of the property of another.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-
lens, J. Hays & New*, for plaintiff and appellant. *S. R. & O. L.
Walker*, for defendants and appellees.

LUDELING, C. J. The plaintiff, claiming to be the owner of twenty-five bales of cotton in the possession of the defendants, sequestered them.

Blakemore, Brothers & Co. appeared and bonded the cotton. In their answer they state that the cotton had been shipped to them by J. Hornthall & Co. for sale, for account of Hornthall & Co. and M. H. Blakemore. Hornthall & Co. and M. H. Blakemore also answered and claimed to be the owners of the cotton by virtue of a purchase in Vicksburg, Mississippi, from Cowan & Co.

It appears from a bill of sale duly proved up, that the plaintiff bought the cotton from one W. S. Langley on the twenty-fourth of December, 1868.

From the evidence in the record it appears that in the State of Mississippi a sale of personal property is complete by the mere consent of

Taylor v. Twenty-Five Bales of Cotton and Blakemore, Wooldridge & Co.

the parties and without delivery. See also 13 Smedes & Marshall 611; 40 Miss. R. 472.

The cotton appears to have been made on Langley's place, and that Tribble was to have an interest in the crop for his services, which interest was to be ascertained by arbitration. Before the arbitration Langley sold to Taylor as aforesaid. There is no proof of bad faith or fraud on the part of Taylor. The sale by Langley vested the title to the cotton in Taylor; and the attempt of Cowan & Co., agents of Tribble, to sell it to the defendants, on the *twenty-sixth of December*, was null, being the sale of the property of another. C. C. 2452.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the plaintiff for the said twenty-five bales of cotton, or the proceeds thereof, with five per cent. interest from the date of the sale thereof, and costs of both courts.

No. 5042.

MRS. CORINNE TESSON and HUSBAND v. A. L. GUSMAN et als.

One of the defendants, A. L. Gusman, moved in the court below to transfer this case to the Circuit Court of the United States, on the ground that he is a citizen of the State of New York, and has that right under the act of Congress approved July 27, 1866, entitled "An Act for the removal of causes in certain cases from the State courts." It appears that there are two defendants besides the one making the application for the removal and that they are citizens of this State.

This being the case, it results from the decision of the Supreme Court of the United States, in the case of *Coal Company v. Blatchford*, 11 Wallace p. 172, that the case is not transferable under the said act of Congress.

The copy of an act of sale of a lot and house under private signature, attested by two witnesses, one of whom made oath before the recorder of the parish of the execution thereof and of the signature of the parties to the act, is insufficient to prove title to real estate, but the original must be produced and the signature proved, giving the privilege to the defendants of admitting or denying the genuineness of the signature. The evidence should have been rejected.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. Favrot & Lamon*, for plaintiff and appellee. *S. P. Greves* and *E. W. Robertson*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sues to be decreed owner of a house and lot in Baton Rouge, which she alleges was sold to her by the ancestor of the defendants. The answer is a general denial. The defendants aver that the plaintiff's pretended act of sale was an act under private signature—that no price was paid for the property—that it remained in possession of the pretended vendor, who collected the revenues arising from it and paid the taxes upon it. They treat the plaintiff's title as a mere simulation. There was judgment in the court below in favor of the plaintiff, and defendants have appealed.

Mrs. Corinne Tesson and Husband v. Gusman et als.

There are several bills of exceptions found in the record. Two of these only we deem it important to examine. The first is to the refusal of the court on application of one of the defendants, A. L. Gusman, to transfer the cause for trial to the Circuit Court of the United States, on the ground that he is a citizen of the State of New York, and has the right under the act of Congress approved July 27, 1866, entitled "An Act for the removal of causes in certain cases from State courts," to have the cause so removed. It appears there are two defendants beside the one making application for the removal and that they are citizens of this State. This being the case, it would appear from the decision of the Supreme Court of the United States in the case of *Coal Company v. Blatchford*, 11 Wallace p. 172, that the cause is not transferable under the act of Congress referred to. The Supreme Court of the United States in that case say: "The eleventh section of the judiciary act of 1789 vests in the Circuit Courts original jurisdiction of suits of a civil nature at law and in equity when the matter involved exceeds, exclusive of costs, the sum or value of five hundred dollars, in three classes of cases :

First—When the United States are plaintiffs or petitioners.

Second—When an alien is a party; and

Third—When the suit is between a citizen of the State where the suit is brought and a citizen of another State. .

In the last two cases, the designation of the party plaintiff or defendant, is in the singular number, but the designation is intended to embrace all the persons who are on one side however numerous, so that each distinct interest must be represented by person, all of whom are entitled to sue, or are liable to be sued in the Federal courts. In other words, if there are several coplaintiffs the intention of the act is that each plaintiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued, or the jurisdiction can not be entertained." We think the application of the plaintiff, A. L. Gusman, for the removal of the cause was properly refused.

The other bill of exceptions was taken to the admission in evidence by the judge, of a certified copy of the act under private signature purporting to be a sale of the house and lot in controversy from Gabriel Gusman to Corinne Tesson. This instrument was attested by two witnesses, one of whom made oath before the recorder of the execution and signature of the parties to the act; and upon this proof it was admitted to record. The objection was that a copy of an act under private signature is insufficient to prove title to real estate, but that the original must be produced and the signature proved, giving the privilege to the defendants of admitting or denying the genuineness

Mrs. Corinne Tesson and Husband v. Gusman et als.

of the signature. We think the objection was well taken and that the evidence should have been rejected. 5 New Series 175, Norwood & Green ; Civil Code 2240, 2241, 2248, 2249.

The case must be remanded for further proceedings.

It is therefore ordered that the judgment of the District Court be annulled and avoided and reversed.

It is further ordered that this case be remanded for further proceedings according to law, the plaintiff and appellee paying costs of this appeal.

No. 5054.

E. J. GAY & CO. v. J. B. LEJEUNE, JR., et als.

After sequestration, a certain quantity of sugar and molasses was, by agreement of the parties, shipped by the sheriff to the firm of Da Silva & Weysham, the proceeds to be held by the sheriff subject to the decision of the court.

By this agreement the parties made the sheriff their agent, and as he was not therein acting in his official capacity, his sureties are not liable for his failure to pay over the money. But he is personally liable, as it is shown that he has several times promised to pay the plaintiff the sum claimed, and there being an obligation on which the promise is based, and the evidence being received without objection.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J.* Jury trial. *W. W. Leake*, for plaintiffs and appellants. *E. Phillips* and *John Yoist*, for defendants and appellees.

HOWELL, J. The plaintiffs sue the defendant, ex-sheriff, and his sureties for \$952 32, with twenty per cent. as damages, it being the balance of the proceeds of certain sugar and molasses sequestered in two suits against one Bovard.

It is shown that after the property was sequestered, by agreement of the parties, it was shipped by the sheriff to the firm of Da Silva & Weysham, the proceeds to be held by the sheriff subject to the decision of the court; but that he never received the money. By this agreement the parties made the sheriff their agent, and as he was not therein acting in his official capacity, his sureties are not liable for his failure to pay over the money. But it is shown that he has several times promised to pay the plaintiffs the sum claimed, having already paid a part of the proceeds, and there being an obligation on which the promise is based, and the evidence being received without objection, he must be compelled to pay.

It is therefore ordered that the judgment of the lower court and the verdict of the jury be reversed and set aside as to the defendant, J. B. Lejeune, Jr., and that plaintiffs recover of him \$952 32, with legal interest from judicial demand, with costs in both courts, and that in other respects the judgment be affirmed.

Gusman et als. v. Mrs. Zulme E. Hearsey and Husband.

No. 5043.

A. L. GUSMAN et als. v. MRS. ZULME E. HEARSEY and HUSBAND.

The partition of succession property, real and personal, can be considered a no more solemn act than the transfer of real property, which may be proved by propounding interrogatories, as was done in this case. Therefore the exception to the interrogatories was not well taken, on the ground that no act of partition can be proven under the law, except by a written act of partition signed and executed by the parties thereto.

The motion to strike out certain specified portions of defendant's answers, as being irrelevant or contradictory, can not be maintained. The object of the interrogatories was to prove a partition by the mutual consent of all the heirs and to establish the consent of the respondent thereto. She certainly had the right to state all the conditions and stipulations of the alleged agreement and the facts upon which her refusal to complete it was based. Such matters are closely linked to the facts on which she was interrogated, and they related to the very gist of the controversy. They are not irrelevant, nor are they contradictory, when taken all together.

The defendant objected to the introduction of her answers, until the plaintiffs had first shown that actual delivery of the property was made under the alleged partition. The answers were properly received. It is a rule of practice under our jurisprudence not to control a party in the order of introducing his proofs.

The defendant's objection to any parol evidence to contradict her answers to interrogatories on facts and articles is well taken. The plaintiffs' action is based on the theory that the partition is a transfer or exchange of real estate, and it is well settled that the answers of a party to interrogatories propounded to prove such transfer or exchange, can not be disproved or contradicted by parol.

The same objection was properly taken to the parol evidence to prove a partition "of the movable property mentioned in each lot." The partition of a succession is the division of the effects of which the succession is composed, among all the co-heirs, according to their respective rights. In this case the succession was composed of real and personal property and rights, and the partition was intended to be of such property and rights as a whole or mass, and the evidence should be that which is necessary in relation to real property.

The proof of the delivery of real property is not confined to written or documentary evidence.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. Samuel P. Greves, A. S. Herron and E. W. Robertson*, for plaintiffs and appellants. *J. W. Burgess, James O. Fuqua, Favrot & Lamon*, for defendant and appellee.

HOWELL, J. This is a suit to enforce an alleged verbal partition of succession property "by propounding interrogatories on facts and articles to the defendant, in order to prove by her testimony that the partition was effected."

The defendant peremptorily excepted "that no act of partition can be proven under the law except by a written act of partition, signed and executed by the parties thereto."

The partition of succession property, real and personal, can be considered a no more solemn act than the transfer of real property, which may be proven by propounding interrogatories, as was done in this case. The exception was not well taken.

The plaintiffs moved to strike out specified portions of two of the answers of the defendant, on the grounds that they were not categori-

cal answers to the questions propounded, and not closely linked to the facts on which she was questioned, and were contrary to her answers to other questions.

The portions objected to are statements of the defendant to the effect that the agreement to make a partition embraced the condition, that a portion of the property should be set aside and sold to pay the debts, including one with the interest thereon due to the respondent, and that the other heirs insisted upon a reduction thereof and positively refused to allow the interest thereon, for which reason she declined to complete the partition. The object of the interrogatories was to prove a partition by the mutual consent of all the heirs and to establish the consent of the respondent thereto. She certainly had the right to state all the conditions and stipulations of the alleged agreement and to the facts upon which her refusal to complete it was based. Such matters are closely linked to the facts on which she was interrogated, and they related to the very gist of the controversy. Nor are they contradictory, when taken all together. The motion to strike out was therefore properly disallowed.

The defendant objected to the introduction of her answers until plaintiffs had first shown that actual delivery of the property was made under the alleged partition. It is a rule of practice under our jurisprudence not to control a party in the order of introducing his proofs, and the answers therefore were properly received when offered. She also objected to any parol evidence to contradict her answers to interrogatories on facts and articles. This objection was well taken.

The plaintiffs' action is based on the theory that the partition is a transfer or exchange of real estate, and it is well settled that the answers of a party, to interrogatories propounded to prove such transfer or exchange, can not be disproved or contradicted by parol. R. C. C. 2275-76; 3 La. 1118; 10 R. 466; 4 An. 103; 10 An. 132; 12 An. 114.

The same objection was properly made to the parol evidence to prove a partition of the movable property mentioned in each lot. "The partition of a succession is the division of the effects of which the succession is composed, among all the co-heirs, according to their respective rights." R. C. C. 1293.

In this case the succession was composed of real and personal property and rights, and the partition was intended to be of such property and rights as a whole or mass, and the evidence should be that which is necessary in relation to real property. It is unnecessary to pass on the other bills of exceptions in the record, further than to remark that the proof of the delivery of real property is not confined to written or documentary evidence.

Gusman et al. v. Mrs. Zulme E. Hearsey and Husband.

Referring to the answers of the defendant, upon which the controversy must be determined, we think the plaintiffs have not proven the alleged partition. Her statement that she declined to consummate it, because her co-heirs refused to allow and provide for the whole of her claim against the estate, which she says was a condition, shows that her consent was not given and that therefore there was not a voluntary partition. R. C. C. 1294.

Her answers do not satisfy us that the partition, which was attempted, was completed, nor does all the evidence, taken together, prove that she took possession of the property in the lot falling to her.

Judgment affirmed.

Rehearing refused.

No. 5066.

EDWARD. J. GAY v. W. L. LARIMORE.

The question in this case is whether the sale, in consequence of which the note sued upon was given, is one *per aversionem*, or per acre.

On the trial, the court below did not err in receiving in evidence, offered by plaintiff, the deeds of sale from the Citizens' Bank and from the sheriff to him, in which the boundaries of the land sold were described.

It follows from said evidence that it was the sale of a plantation described in certain deeds wherein the boundaries were specifically set forth, with all that was upon it, for a certain price for the whole. It was a sale *per aversionem*, and not per acre. The plaintiff purchased by boundaries and sold by boundaries within which the number of acres is described "as more or less."

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Cole, J. Barrow & Pope*, for plaintiff and appellee. *Herron & Gallagher, Fuqua & Calliham, R. T. Posey*, for defendant and appellant.

MORGAN, J. The defense to the note sued on is that it was given in part payment of certain lands sold by plaintiff to defendant, and that the quantity he acquired is not the quantity he purchased. The question is whether the sale was one *per aversionem*, or whether it was a sale per acre.

Gay sold to Larimore the Mound Magnolia plantation, situated in the parish of East Baton Rouge, State of Louisiana, and composed of the following tracts of land, to wit:

First—A tract of land acquired by Gay by deed from the sheriff of the parish of East Baton Rouge, and adjudicated to him at sheriff's sale on the fourth April, 1868, made under seizure in the suit of Edward J. Gay v. W. J. Sharp, Samuel Matthews and Leodocia Davis, wife of George W. Clarke, in the Fifth District Court of said parish, and containing nine hundred and eighty-five acres, more or less.

Second—The tract of land known as the Vail tract, adjoining the above described on the south, containing two hundred and forty acres,

being the same acquired by said Gay from the Citizens' Bank of Louisiana, together with one hundred and twelve shares of the capital stock of said bank, and all the buildings, fixtures and implements thereunto belonging or thereto attached, together with the growing crops thereon, as well as the hogs, mules, oxen, horses and sheep thereon, and all the corn and hay remaining on the place from the crop of the previous year.

The sale was made for and in consideration of the sum and price of \$35,000.

On the trial, plaintiff offered in evidence the deeds of sale from the Citizens' Bank and from the sheriff to him, in which the boundaries of the land sold were described. The court did not err in receiving them.

The sale was not, in our opinion, a sale of so many acres of land at so much per acre. It was the sale of a certain plantation described in certain deeds referred to in the act of purchase, wherein the boundaries were specifically set forth, with all that was upon it, for a certain price for the whole. It was the sale of a plantation, and not of so many acres of ground. Gay himself purchased by boundaries; he sold by boundaries. The number of acres was described as "more or less" in the Mound Magnolia place. If he had sold more than was mentioned in the deed, Larimore would have taken the surplus; if he sold less, Larimore must take less.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

HOWELL, J., *dissenting*. The evidence in this case brings me to the conclusion that the parties contracted with reference to the quantity rather than to any fixed limits or boundaries of the land, and as the deficiency is considerably more than one-twentieth, I think the defendant is entitled to a proportionate reduction of the price.

In the agreement of sale the titles of the vendor are not referred to as containing a description with boundaries, but merely, I think, as the source of his acquisition, and at the time one of his titles was not recorded and no proper description of it is given; and in the notarial act of sale, executed some months afterwards in a distant city, the description is not made any more specific, except to give the date of and notary passing the said act, which was recorded after the said agreement.

The authorities cited by the plaintiff do not, in my opinion, sustain his position.

I therefore dissent.

Rehearing refused.

No. 4994.

GEORGE M. BAYLEY, Testamentary Executor, v. DAVID DENNY.

It is well settled that a coproprietor can not erect improvements on the common property and compel the other joint owner to contribute to pay for the same without the consent of the latter.

The defendant in this case contends that as Bayley, the plaintiff, sold him the undivided half of a plantation which he held in common with Pugh, "together with the undivided half of the buildings and improvements thereon," he sold him half of *all* the improvements, including those erected by Pugh, without plaintiff's consent; that this sale was virtually an election to take half of said improvements made by Pugh; that it was an implied promise to pay for half the value thereof; and that from this instrument an obligation arose binding Bayley to pay for half the value of said improvements, which are proved to be worth \$4000, wherefore defendant refuses to pay for the last two installments due on his purchase.

Pugh was not a party to the instrument, which is alleged to contain said implied election on his behalf. This court is of opinion that there was no such election, implied or express, in that instrument, and as the plaintiff, Bayley, was not bound to pay Pugh for the improvements, he incurred no obligation in favor of Denny, the defendant, on the payment by the latter of \$4000 to Pugh for half of the improvements.

Assuming that Bayley sold to the defendant the improvements erected by Pugh, which is denied, there is no eviction shown; consequently no obligation arising from warranty can be set up in defense of this action. Besides when, as in this case, the purchaser is aware of the outstanding title of a third party, or the circumstances out of which the subsequent disturbance arose, he can not suspend payment of the price, nor require security against eviction.

On the trial the court *a qua* did not err in receiving the evidence offered to explain what improvements were intended by the parties to be sold—whether the improvements belonging to the joint ownership only, or whether also the improvements belonging to one of the coproprietors. The object of this proof was to ascertain the value of the subject to which the instrument refers.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J. Gilmore & Sons, Bush & Guion*, for plaintiff and appellant. *Nicholls & Folse*, for defendant and appellee.

WYLY, J. In 1867 R. H. Bayley, whose succession is represented by the plaintiff, purchased at sheriff's sale under the judgment in the case of *Domas v. Seymour*, the undivided half of a sugar plantation in the parish of Assumption, together with certain movable property thereon, and he leased the same to the defendant, David Denny, till the thirty-first December, 1870, for the price of \$700 per annum. The other half of the plantation belonged to R. L. Pugh, the brother-in-law of Denny. Denny and Pugh lived on the plantation and cultivated it in partnership. The sugar house on the plantation had been destroyed by fire before it was acquired by the coproprietors, Pugh & Bayley. In 1868 Pugh urged Bayley to join him in rebuilding the sugar house and also in erecting other improvements upon the common property, each to bear half of the expenses. This Bayley positively refused to do, and Pugh threatened a judicial partition. The crop of 1868 was ground at a neighboring sugar house. In 1869 Pugh, without the consent of Bayley, rebuilt the sugar-house and erected six cabins on the plantation, at an expense of some eight thousand dollars. Negotiations

26	255
52	778
26	255
111	250
111	272

26	326
118	1030

26	255
117	805

26	255
121	975

26	255
125	557

were subsequently opened by Pugh with Bayley for the purchase of his share or interest in the plantation. This did not result in a sale, because the parties failed to agree as to terms. Bayley only proposed to sell his interest in the property, not including the improvements erected by Pugh. He also distinctly informed Pugh that he would bear no part of the expenses of said improvements.

He subsequently sold to his lessee, Denny, the brother-in-law of Pugh, who cultivated the land in partnership with him, and who knew that Bayley refused to contribute to pay for the improvements erected by Pugh on the common property. This sale was made in March, 1870, for the price of \$12,843, one-fourth cash, and the balance in three equal installments of one, two and three years.

The second installment was paid, but when the third and fourth matured the defendant declined to pay them; and the plaintiff brought this suit to foreclose the mortgage *via ordinaria*. The court maintained the defense that plaintiff's demand should be reduced \$4000; because after the purchase, to wit: in June, 1870, Denny paid that sum to Pugh for half the value of the improvements erected by him on the common property. From this judgment the plaintiff appeals.

It is well settled that a coproprietor can not erect improvements on the common property and compel the other joint owner to contribute to pay for the same, without the consent of the latter. Succession of Morgan v. P. L. Morgan, 23 An. 502.

Therefore, when R. L. Pugh erected the six cabins and rebuilt the sugar house on the plantation owned by him and Bayley, without the consent of Bayley, the latter incurred no obligation to contribute to pay for said improvements.

The defendant, however, contends that as Bayley sold him the undivided half of the plantation, "together with the undivided half of the buildings and improvements thereon," he sold him half of all the improvements, including those erected by Pugh; and that this sale was virtually an election to take half of said improvements erected by Pugh, with an implied promise to pay for half the value thereof; and that from this instrument an obligation arose binding Bayley to pay for half the value of said improvements, which is proved to be worth \$4000. Pugh was not a party to the instrument, which is alleged to contain the implied election of Bayley to take half the improvements erected by Pugh on the common property and to pay for half the value thereof.

In that instrument, which is merely the sale from Bayley to Denny, there is no stipulation in favor of Pugh, nor is there an *aggregatio mentionum* between the parties on the subject of Bayley's obligation to pay for improvements erected by Pugh on the common property. The

subject is not mentioned, and we are of opinion that that instrument will be searched in vain to find any promise, express or implied, binding Bayley to pay Pugh, his coproprietor, for improvements erected by the latter, without his consent, on the common property. As Bayley was not bound to pay Pugh for the improvements, he incurred no obligation in favor of Denny by the payment by the latter of the \$4000 to Pugh in June, 1870. There was no eviction shown in this case, (assuming that Bayley sold the defendant the improvements erected by Pugh, which is denied); consequently no obligation arising from warranty can be set up in defense of this action. 13 An. 432, 17 La. 25, 3 An. 699, 2 An. 459.

It is true the sale of another's property is null, and in such a case eviction by judicial action is not required to entitle the purchaser to relief. C. C. 2427, 9 R. 283, 10 R. 425, 3 An. 326.

But where, as in a case like this, the purchaser was aware of the outstanding title of a third party, or the circumstances out of which the subsequent disturbance arose, he can not suspend the payment of the price, nor require security against eviction. C. C. 2535, 8 N. S. 330, 15 La. 174, 19 La. 255, 3 An. 337, 5 An. 166-365, 10 An. 301, 11 An. 122, 9 R. 324.

The plaintiff, however, denies that his testator sold the defendant the improvements erected by Pugh; that it was only the share or interest of Bayley in the land and improvements that was intended to be conveyed. And this is supported by the evidence in the record. The defendant excepted to the introduction of parol evidence and the letters of Bayley, Denny and Pugh, on the ground that it was attempting to explain, add to, contradict and vary the deed and mortgage upon which the suit was based. The deed recites that Bayley sells to Denny the undivided half of the plantation therein described, "together with the one undivided half of the buildings and improvements thereon and the agricultural implements thereunto appurtenant: being the same property which was acquired (except the eighteen acres above mentioned and reserved) at a sale made by the sheriff of the parish of Assumption on the twenty-fourth of April, 1867, at the suit of Amédée Domas v. John K. Seymour, No. 1384." There were improvements belonging to the joint owners, and there were improvements erected by Pugh and not claimed by Bayley.

We think the court did not err in receiving the evidence to explain what improvements were intended by the parties to be sold; whether the improvements belonging to the joint ownership only, or whether also the improvements belonging to one of the coproprietors.

The object of this proof was to ascertain the nature of the subject to

Bayley, Testamentary Executor, v. Denny.

which the instrument refers. Greenleaf on Evidence, chapter 15, paragraph 286, and authorities there cited.

There are other questions, but they are not serious. It is therefore ordered that the judgment appealed from be amended by rejecting the reconventional demand of the defendant, and as thus amended that it be affirmed, appellee paying costs of appeal.

26 258
46 1844

No. 4553.

BUSSEY & Co. v. J. A. ROTHSCHILDS.

In the jurisprudence of this State the writ of attachment is considered a harsh remedy, and should not be granted, except where the creditor is clearly entitled to it. The evidence in this case does not make it clear that the defendant was about to convert his property into money or evidences of debt with the intent to place it beyond the reach of his creditors, as alleged, and as the law prescribes.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. Farrar*, for plaintiffs and appellants. *J. O. Seale* and *H. R. Morrison*, for defendant and appellee.

HOWELL, J. The plaintiffs have appealed from a judgment dissolving a writ of attachment obtained by them against the property of the defendant, on the allegation that he was "about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors." A careful examination of the evidence does not convince us that the judge *a quo* erred. In our jurisprudence this writ is considered a harsh remedy, and should not be granted except where the creditor is clearly entitled to it. The evidence does not make it clear that the defendant was about to convert his property into money or evidences of debt with the intent to place it beyond the reach of his creditors, as alleged, and as the law prescribes as the ground for the writ.

It seems that the plaintiffs had issued a writ of sequestration and a writ of attachment, under which all the property of the defendant, including a stock of goods, a lot of cotton, work animals, etc., was seized, and upon a compromise between the parties was released and restored to the defendant, upon the promise, as alleged, that he would ship to plaintiffs all the cotton he could get from his lessees and debtors, and pay to them what he could realize upon the sales of his goods. The acts complained of and shown by the evidence are that a few days after this agreement the defendant sold four bales of cotton to pay his landlord, who had taken out a provisional seizure, and sent two or three of his work animals to his brother's plantation, a few miles distant.

Bussay & Co. v. Rothschilda.

The sale of the four bales of cotton, as made, was certainly not with the intent to place them beyond the reach of the creditors, for their proceeds went to pay a privileged and pressing debt, and there is no proof that he made any effort to sell his work animals or any of his goods out of the ordinary course of trade. But it is shown that on the very day the second attachment was levied he shipped on the railroad fifteen bales of cotton to the plaintiffs. It is true this lot of cotton seems to have been somewhat irregularly taken possession of by the sheriff under the writ of attachment, and two or three days after the writ had been executed upon other property, and was turned over to the sureties of the defendant on his release bond. But this can not be deemed a ground for the issuance of the writ, having occurred after it was issued. While it may be true that the defendant may not have been fulfilling his promises to plaintiffs as faithfully and rapidly as the latter had a right possibly to expect, the facts developed by the evidence do not justify the harsh and summary writ of attachment.

Judgment affirmed.

No. 5028.

STATE OF LOUISIANA, ex rel. P. A. SIMMONS, President, and CHARLES LEROY, Treasurer, v. D. H. BOULLT.

The defendant can not be proceeded against by mandamus to pay into the parish treasury \$5000 which he has collected as tax collector.

A PPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Jack & Pierson* and *M. J. Cunningham*, for plaintiffs and appellees. *O. Chaplin & Sons, Levy & Pierson, Morse & Dranguet*, for defendant and appellant.

MORGAN, J. The defendant appeals from a judgment commanding him by mandamus to pay into the parish treasury \$5000 which he has collected.

Defendant contends that he can not be proceeded against by mandamus. We think with him.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the proceeding by mandamus be dismissed without prejudice to the plaintiffs' rights to proceed against him in the manner pointed out by law, plaintiffs to pay costs in both courts.

Rehearing refused.

No. 5034.

DESIREE HICKMAN v. AMOS B. THOMPSON.

A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing seized; second, when he contends that he has a privilege on the proceeds.

In this instance it is not contended that the minors on whose behalf an intervention is made, own the property seized; and if they had a privilege on its proceeds, about which this court says nothing, it could only be enforced when the sale had been effected. It has not been shown that there is any law authorizing a judge to order, as he did, the sheriff to make no title to property to be sold under execution unless it bring the price fixed upon by him.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. T. C. Manning*, for plaintiff and appellant. *R. T. Bowman*, for defendant and appellee.

MORGAN, J. Desirée Hickman mortgaged her interest in a piece of property which she owned as partner in the community which had existed between her deceased husband and herself. When Thompson, the owner of the mortgage, attempted to sell the property mortgaged, Mrs. Hickman enjoined the sale, alleging that the property belonged to the succession of her late husband, which had never been closed, against which large claims had been preferred. This court set aside the injunction, and ordered the property to be sold to satisfy the mortgage held by Thompson. See 24 An. p. 264.

When the sheriff was about to sell the property in obedience to the decree rendered by this court, Thomas B. French, alleging himself to be the under tutor of the minors Hickman, filed a third opposition, alleging that the property advertised to be sold belongs to their tutrix; that their tutrix owes them \$25,000; that their tacit mortgage to secure the same has been recorded within the time prescribed by law; that they are entitled to be paid out of the proceeds of the land to be sold the amount of their debt, and they prayed that the sheriff be ordered to retain in his hands the sum due set forth (\$25,000) out of the proceeds of the sale, and if not paid in cash that he be ordered not to make title to the purchaser until said sum is paid. They further alleged that unless the property brings the amount of the first mortgage, viz: the sum of \$25,000, with interest as claimed, the second mortgage creditor can not sell under his mortgage, and they prayed the court to order the sheriff to pronounce it no sale in that event, and not to adjudicate the property to any purchaser until the bid shall equal the amount of their mortgage. These orders were issued as prayed for. The property was offered for sale, and Thompson bid thereon two-thirds of the appraised value thereof, but the sheriff, by reason of the order just referred to, refused to adjudicate it to him. Then the plaintiff, alleging her necessitous circumstances, claimed to

Hickman v. Thompson.

be entitled to one hundred and sixty acres of the land about to be sold, or so much thereof as may be worth \$2000, under the homestead act, and prayed that defendant and the sheriff be ordered to desist from selling or making title to the quantity of land above specified and the dwellings and improvements thereon. And the court ordered the sheriff to desist from making a title to the whole land until the rights and demands of the petitioner be heard and determined.

Both oppositions were dismissed, and the orders therein given revoked by the court which allowed them to be filed on a hearing, and the opponents have appealed.

There is no error in the judgment. A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing which has been seized; or, second, when he contends that he has a privilege on the proceeds of the thing seized and sold. C. P. 396. Here it is not contended that the minors own the property which had been seized, and if they had a privilege on its proceeds, with reference to which we say nothing, it could only be enforced when the sale had been effected. We have been referred to no law by the counsel for appellants, nor do we know of any, which authorizes a judge to order the sheriff to make no title to property to be sold by him under execution unless it bring the price fixed upon by him.

As to the plaintiff, she can not, we think, be considered in the indigent circumstances contemplated by the law. If her interest in the property seized was taken from her she would still have the usufruct of the balance.

Judgment affirmed.

No. 4862.

LEONVILLE AUGUSTIN v. MRS. H. DOURS et als.

The plaintiff attempts to restrain by injunction the defendants, his daughters who are his judgment creditors, from selling under execution his dwelling house and other buildings which he erected on their lot, separately from the lot.

As the plaintiff could transfer whatever right or ownership he may have to the buildings standing on the defendants' property, it is not seen why a forced sale thereof may not be made by the defendants, his judgment creditors.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. E. Filleul*, for plaintiff and appellant. *W. E. Murphy*, for defendants and appellees.

WYLY, J. The plaintiff appeals from the judgment dissolving the injunction restraining the defendants (his daughters), who are his judgment creditors, from selling under execution, his dwelling house and other buildings which he had erected on their lot, separately from the lot.

Augustin v. Mrs. H. Dours et als.

The plaintiff insists that the buildings can not be sold separately from the lot. The defendants contend that they are not bound to levy on their own lot in order to reach the buildings, the property of their debtor, illegally erected on their lot. As the plaintiff could transfer whatever right or ownership he may have to the buildings standing on the defendants property, we do not see why a forced sale thereof may not be made by the defendants, his judgment creditors.

The case of the Citizens' Bank v. Crook, 21 An. 324, cited by the plaintiff, is an entirely different case from the one before the court, and there is no analogy between them.

Judgment affirmed.

No. 4940.

MRS. ANN ELIZA RAINEY, wife of JAMES H. MASSEY, v. FANNY ASHER and Sheriff HARPER.

Plaintiff borrowed money to pay two notes which were secured by mortgage upon the property she claims as her own, and to prevent the sale of which she enjoins the sheriff, and the two notes were paid with the proceeds of this loan. It is not, therefore, true, as she alleges, that the money was borrowed and used for the benefit of her husband. This is established by the testimony of the notary who drew the act of mortgage and of the broker through whom the money was borrowed. It was a fact necessary to be established. The objection to this evidence was properly overruled.

The acts of mortgage under which plaintiff borrowed the money upon the note, the collection of which she has enjoined, and which show her antecedent indebtedness, relate that she had been specially authorized to borrow the money by the judge of the Third District Court of the parish of Orleans. Her objection to the introduction of these acts was not well founded. They were signed by her and were, therefore, her own acts and declarations. Admitting that they could be disproved by parol, the burden of doing so rested upon her.

The objection that the judge of the Third District Court of the parish of Orleans, where she resides, had no power to authorize her to make the loan, is without solid foundation.

The judge of the Third District Court is as much a district judge as any other district judge in the parish. The law says that a married woman who desires to borrow money and to mortgage her own property to secure the same, must be authorized so to do by the judge of the district or parish in which she resides. As the judge of the Third District Court, although having a limited jurisdiction for the convenience of business, is a district judge for the parish of Orleans, it follows that plaintiff was authorized by the judge of her district in the sense of the law.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Semmes & Mott*, for plaintiff and appellant. *Roselius & Philips*, for defendants and appellees.

MORGAN, J. The defendant, holder and owner of an overdue promissory note, secured by mortgage, drawn by the plaintiff for \$2250, obtained an order of seizure and sale thereon.

Plaintiff, alleging that she is the owner of the property under seizure, and alleging that on the twenty-third of June, 1871, through the improper influences of her husband, who constantly urged her thereto,

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she granted the mortgage under which her property was seized; and alleging further that the note in question was negotiated by her husband, and that the proceeds were used by him; and alleging that the mortgage, the note, and the money, were all for the benefit of her husband, and that they were obtained from her by unlawful means; alleging that she was not examined and authorized, as by law required by section 3982 of the Revised Statutes, by the judge of the district or parish where she resides, separate and apart from her husband touching the object for which the money was borrowed; alleging that the judge of the Third District Court who gave the certificate annexed to the act of mortgage had no authority or jurisdiction to examine her or to grant such certificate, the Third District Court for the parish of Orleans not being a court of general jurisdiction, but of limited jurisdiction, confined to appeals from justices of the peace, obtained an injunction prohibiting the defendant and the sheriff from proceeding with her execution. In these proceedings she is joined and assisted by her husband.

The evidence in the record satisfies us that her allegations with regard to improper influence on the part of her husband by which she was induced to create the debt and that the money which she borrowed was used by him for his benefit, are not true.

She borrowed the money to pay two other notes which were secured by mortgage upon the property in question, and the notes were paid with the proceeds of this loan. This is established by the testimony of Guyol, the notary who drew up the act of mortgage, and by Cammack, the broker through whom the money was borrowed. The testimony of these witnesses was objected to by the plaintiff, but we think the court properly received it. It was a fact necessary to be established, and could, we think, be established by any witness who knew them. The allegation that before borrowing the money, the return of which is now about to be exacted from her, she was not examined by and authorized so to do, by the judge of the district or parish where she resides, separate and apart from her husband touching the object for which the money was borrowed, is not established. This is a fact which it was in her power to prove, and she introduced no evidence to establish it. The acts of mortgage under which she borrowed the money upon the note, the collection of which she has enjoined and which show her antecedent indebtedness, relate that she had been specially authorized to borrow the money by the judge of the Third District Court of the parish of Orleans. Plaintiff objected to their introduction. We think they were properly received. They were signed by her and were, therefore, her own acts and declarations. Admitting that they could be disproved by parol, the burden of doing so rested upon her.

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Her last objection that the Third District Court for the parish of Orleans not being a court of general jurisdiction, but of limited jurisdiction, confined to appeals from justices of the peace, and, therefore, the matter here involved exceeding the jurisdiction of that court, the judge thereof had no power to authorize her to make the loan, is, we think, without a solid foundation. The judicial district of the parish of Orleans is divided into several district courts. For the proper dispatch of business certain of these courts are given exclusive jurisdiction, but the judge of the Third District Court is as much a district judge as is any other district judge in the parish. The law says that a married woman who desires to borrow money and to mortgage her own property to secure the same, must be authorized so to do by the judge of the district or parish in which she resides. As the judge of the Third District Court is a district judge for the parish of Orleans, and as the plaintiff is a resident of the parish of Orleans, and as she was authorized by that judge, it follows, we think, that she was authorized by the judge of her district in the sense of the law.

The judgment of the lower court was against her.

Judgment affirmed.

No. 4871.

CITIZENS' BANK OF LOUISIANA v. CLARENCE L. JAMES.

Defendant's refusal to fulfill a certain agreement with the Citizens' Bank in relation to the sale of a plantation to said defendant, on the alleged ground of an error of fact in the agreement, can not avail him.

Error is said to be the greatest defect that can occur in a contract, but the error must be in respect to the object of the agreement, the identity or quality of the subject. That is called error of fact which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none.

In this case the error as to the value of the property which defendant agreed to buy, was no error of fact, but if it existed, an error of judgment. This is an error for which the law furnishes no relief. Besides, certain allegations of the defendant in reconvening for damages resulting from the pretended noncompliance of the bank with its allegations, contradict his own allegations as to his error about the value of the property.

It is not in the power of this court to force defendant to comply with his contract. The penalty he incurs for violating it, is the damage he has occasioned.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J.* Jury trial. *Pitot, Labatt, Aroni & Olinton*, for plaintiff and appellant. *Spencer, Farrar & Reeves*, for defendant and appellee.

MORGAN, J. Joshua James was indebted to the plaintiffs in a sum exceeding \$109,000, of which \$61,489 were due, on account of arrearage installments and interest, and the balance, \$47,620, in his stock note due on the first of April, 1867. To secure this debt, his plantation was mortgaged to the bank.

On the twelfth of March, 1867, the bank made an arrangement with Clarence L. James, through his father Joshua James (whose authority as agent is not disputed), by which the bank agreed to foreclose the mortgage against the plantation, and to bid thereon \$55,000, and if purchased by it, to sell the same back with the mortgage stock attached to it to Clarence L. James for \$50,000, payable in twenty years, in his stock note. It was also agreed that C. L. James was to deposit with the bank his notes of William T. Martin, trustee of the heirs of Barnard for \$6250 each, to secure the payment of his stock note, the amount when paid to be used as follows: \$10,000 to go in part payment of the stock note of C. L. James, and the balance to be used by him to improve the plantation.

The bank foreclosed the mortgage and bought in the plantation. It alleges that C. L. James has been in possession thereof from the date of their agreement; that he has never paid the installments due on stock debt; that the installments due amount to \$6684, and that there is due ten per cent. on \$50,000, according to its charter. It prays for judgment against him for \$6684, with ten per cent. interest on \$50,000 from fourteenth of March, 1868, and that the defendant be ordered to accept the sale of the property, and that he furnish his stock note for \$42,216, payable fourteenth of March, 1871, and renewable according to the charter of the bank, or that in default thereof possession of the property be given to it, and that it have judgment against the defendant for \$6000 for the use and enjoyment of the plantation since the date of his contract, and \$5000 per annum from judicial demand until possession is restored to it.

Defendant admits the agreement. But he says that he faithfully complied with all of his stipulations, by depositing with the bank the two notes of Martin, and by tendering his stock note for \$50,000, payable in twenty years. He avers that the bank failed to buy in the plantation until the month of October, 1869; that it collected a portion of the two Martin notes, and compromised the balance at a loss of more than half of the value thereof, and refused to accept his note in accordance with the terms of their agreement, and refused to make him a title to the property as was agreed; that on the faith of the agreement between them, he built upon the plantation improvements worth \$5000; that in consequence of the uncertainty of his title, he has been prevented from improving the property so as to render the same productive, and has been unable to cultivate the same, and that he has thus, and by the bad faith of the bank, been damaged to the extent of \$50,000. He avers further that the bank has not only ignored his rights to become the owner of the plantation under their agreement, but that, with the view of damaging him, actually bargained the place

to one P. J. Kennedy. He avers that at the time their agreement was entered into, and at the time the bank purchased, the property was not worth \$20,000, and that the bank actually purchased it for \$15,000, and that now, taking advantage of its position, it is attempting to extort from him double the price it paid for it. He avers that he entered into the agreement under the belief that he would be called upon to pay, in all, at the expiration of twenty years only \$50,000, and that if his agreement is held to have obliged him to pay more than that sum, then he avers that his consent was given in error of fact, and should be declared null and void; in which event he avers that he is entitled to recover back from the bank the value of his improvements—\$5000—and the amount of the Martin notes, now amounting to \$25,000.

He also reconvened, and prayed for judgment against the bank for \$50,000, resulting from its bad faith and tortious conduct, and that he be quieted in his title and decreed to be the owner of the property.

The case appears to have been submitted to a jury, who found a verdict for the defendant, and in accordance therewith a judgment was rendered amending the agreement sued upon for error, giving to the plaintiff possession of the property, and giving to the defendant a judgment for \$5000, with legal interest thereon from twentieth July, 1870, till paid, and condemning plaintiff to pay costs.

Plaintiff has appealed.

Defendant's objection to complying with his agreement that the bank failed to buy in the plantation until October, 1869, is no excuse. The bank sold the property as soon as the papers necessary to carry on the suit, which had been lost, were found. Besides, the defendant went into possession of the property as soon as his agreement with the bank was made. Neither can he object to what was done with the Martin notes. The bank sued Martin on them. Martin offered a compromise, and the defendant agreed to it on condition that out of the \$10,000 which Martin was to pay, \$5000 was to go to him, and these \$5000 he received. His defense that if his agreement with the bank made him responsible for more than \$50,000, to be paid without interest, it is void on account of error of fact, can not, we think, avail him. Error is said to be the greatest defect that can occur in a contract, but the error must be in respect to the object of the agreement, the identity or quality of the subject. Pothier, p. 10. "That is called error of fact which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none." C. C. 1821. Now the defendant was not in error as to the existence of the thing which was the subject of his agreement with the bank, or its identity or quality. His error as to the value of the prop-

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erty which he agreed to buy was not error of fact, but, if it existed, error of judgment. This is an error for which the law furnishes no relief.

If the bank refused to take the note which he offered, it was, we think, because it was not the note which their agreement called for. It was expressly understood that the note to be given was a stock note, which by the charter of the bank bears interest. This must have been known to the defendant, as it was to his father, who conducted the negotiation for him, acting as his agent. In his testimony the father says he thought C. L. James would have nothing to pay for several years, because the notes deposited by him would "pay the interest on the stock note to be given for several years to come, and the payment he would have to make would be about \$2500 a year. The notes deposited with the Citizens' Bank as collateral security would have paid the interest and the ten per cent. of the principal for several years." Besides, the allegation that he has been damaged \$50,000 by the bank not having complied with the terms of the agreement, is somewhat destructive of his allegation that he was to pay only \$50,000 without interest. The damage he claims to have sustained is the profit he would have made if he had been enabled to cultivate the place. A place upon which a profit of \$50,000 can be made in a few years, is certainly worth \$50,000 to be paid for in twenty years, with six and a half per cent. interest per annum.

The allegation that he spent \$5000 in improving the property, is rather inconsistent with his other allegation that the course of the bank prevented him from improving it so as to render it productive. We do not think it has been established that the negotiations which were for a moment pending between the bank and Kennedy with regard to selling the plantation to him, caused him any damage.

Defendant has been in possession of the plantation since the twelfth of March, 1867, and has enjoyed the revenues thereof. The number of acres of land under cultivation is fixed by the witnesses at two hundred. The rent of the land is worth five dollars per acre. He would, therefore, owe, in rent, \$7000. The bank has received \$5000. The improvements are worth \$2500.

The bank asks that the defendant should be compelled to comply with his contract. It is not in our power to force him to do so. The penalty he incurs for violating it is the damage he has occasioned.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the Citizens' Bank, and against the defendant Clarence L. James, ordering him to accept the sale of the property and stock formerly belonging to Joshua James, and described in the

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sheriff's deed of sale of the eighth of October, 1869, and furnish his stock note, dated March 12, 1867, and payable the fourteenth of March, 1871, for \$50,000, with a credit thereon of \$5000, and renewable according to the charter of the bank, or that in default thereof, within sixty days from the recording of this decree, that a writ of possession issue in favor of the bank putting it in possession of the property above described, upon paying to the defendant the sum of \$500; defendant to pay costs in both courts.

No. 5101.

STATE OF LOUISIANA v. SUCCESSION OF MASTERS et als.

In this suit against the succession of a defaulting tax collector and his sureties, a bill of exceptions is taken by defendants to the admission of a certified extract from the books of the State Auditor, showing the indebtedness of the deceased tax collector to the State, on the ground that it was not the best evidence, but a copy and the absence of the original was not accounted for, and such original could not furnish proof of the statements contained in the copy.

The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office under his official seal.

A PPEAL from the Tenth Judicial District Court, parish of Carroll. *Hough J. Hiram R. Steel*, District Attorney, and *J. W. Montgomery*, for plaintiff and appellee. *J. E. Leonard*, for defendants and appellants.

HOWELL J. This is a suit against the succession of a defaulting tax collector and his sureties, and the principal question is presented in a bill of exceptions taken by defendant to the admission of a certified extract from the books of the State Auditor, showing the indebtedness of the deceased tax collector to the State, objected to on the ground that it was not the best evidence, but a copy and the absence of the original was not accounted for, and such original would not furnish proof of the statements contained in the copy.

The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books, and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office, under his official seal. R. S. sections, 174, 182, 191, 253, 255.

In the case of *Hughey v. Barrow*, 4 An. 252, the Court said. If the Auditor was bound to record the fact, the proper evidence is a copy of the record duly authenticated and referred to, 1. Greenleaf, section 498. And in *State v. McDonnell*, 12 An. 741, which was a suit on the bond of a tax collector, as is this, it was held that the account of the Auditor when introduced, makes evidence against the collector and his sureties. The question of the admissibility of such account, duly authenticated, was not before the court, and what was said in reference to its being received without objection, was to show the impropriety of raising the question on appeal as to its sufficiency. We do not understand the language used to imply that the account, if duly authenticated, would have been excluded if it had been duly objected to.

It is unnecessary to pass on plaintiff's bill of exceptions. We see no force in any of the other points suggested in defendant's brief. The only party who appealed, is the representative of Master's succession. Judgment affirmed.

No. 5143.

BETTIE CLEMENS, Guardian, etc., v. FRANCIS AUGUSTUS COMFORT.

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In 1861, by an act of the Legislature, a part of the territory of the parish of Madison, embracing the plantation claimed in this suit, was transferred to the parish of Tensas after the decease of the owner, who died in 1855.

In 1867 an attempt was made to open the succession of the deceased in the parish of Tensas, by appointing a curator of absent heirs, who caused the property to be sold to pay debts, as it is alleged. It is through this sale that the defendant claims to hold.

The probate court of Madison parish, where the deceased had his domicile at the time of his death, had exclusive jurisdiction of his succession. Everything done in that succession in the parish of Tensas was therefore null and void.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough*, J. Jury trial. *E. D. Farrar* and *John Ray*, for plaintiff and appellee. *Drake & Garrett*, *Thomas P. Farrar* and *E. H. Farrar*, for defendant and warrantors, appellants.

LUDELING, C. J. This is a petitory action. F. A. Comfort, who was in the actual possession of the land claimed, disclaimed title, but alleged it was in Mrs. Julia Trezevant. Mrs. Trezevant for answer alleged that she was the owner under a just title, and called J. E. Slicer in warranty. The case was then continued till the next term of the court, when Slicer filed his answer, averring that he transferred to Mrs. Trezevant a valid title, "the same having been homologated by a judgment of monition," etc.

The case was tried by a jury, who rendered a verdict in favor of the plaintiff for the land and for rents at the rate of \$510 per annum from first January, 1868, and costs.

The plaintiff entered a *remittitur* for \$750 for taxes paid by defend-

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ant and for value of improvements made on the lands, and judgment was rendered in accordance with the verdict and *remittitur*.

The defendant has appealed.

The evidence shows that the plaintiff's wards are the children and heirs of H. H. Groves, who died in 1855; that at the date of his death he was the owner of the place in controversy, upon which he resided, and which was then situated in the parish of Madison. It further appears that his widow was confirmed as natural tutrix to his children; that an inventory of the property was made and letters of tutorship were issued to her.

In 1861, by an act of the Legislature, a part of the territory of the parish of Madison, embracing the plantation in question, was transferred to the parish of Tensas. In 1867 an attempt was made to open the succession of H. H. Groves in the parish of Tensas by appointing a curator of absent heirs, who caused the property to be sold to pay debts, it is alleged. It is through this sale that the defendant claims to hold.

The probate court of Madison parish, where the deceased had his domicile at the time of his death, had exclusive jurisdiction of his succession. C. C. 935; C. P. 929; Succession of Williamson, 3 An. 261; 21 An. 399. Everything done in that succession in the parish of Tensas was therefore null and void.

This view of the case renders it unnecessary to pass upon the bills of exceptions taken on the trial.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 5023.

JULIUS LEVIN et als. v. JOHN DE LACEY, Sheriff, et als.

Article 261 C. P., authorizing the sale, for certain causes, of property under attachment, does not direct the sheriff to take from the purchasers bonds in the nature of judgments, as in sales under executions, and the expressions "to have the force and effect of a judgment at law," used in said bonds, must be considered as mere surplusage. This court knows of no law which gives to such bonds the form of a judgment upon which an execution may issue. Therefore, the injunction in this case should have been maintained without prejudice to the rights of parties upon the said bonds.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. James G. White*, for plaintiffs and appellants. *R. A. Hunter*, for defendants and appellees.

HOWELL, J. In the case of Joseph Hoy & Co. v. B. Weiss, No. 1713 of the docket of the lower court, property of the said defendant was attached, and on a rule judgment was rendered dissolving the attachment, from which the plaintiffs, Joseph Hoy & Co., appealed suspen-

sively. Afterwards they obtained an order, under Article 261 C. P., to the sheriff, to sell the said property according to law and retain the proceeds in his hands subject to the order of court. The property was advertised to be sold for cash, but two-thirds of the appraisement not being bid, it was again advertised and sold on twelve months credit, the purchaser giving three bonds in favor of the sheriff, with the plaintiffs in this suit as his sureties. More than a year after their maturity, three several writs of *fi. fa.* were issued on them and the property of the plaintiffs was seized, whereupon they enjoined the sale thereof on the grounds that the said instruments are informal and null, not being taken in accordance with law and not authorizing execution thereon, as in case of twelve months bonds given in the execution of judgments.

The assignees of Joseph Hoy & Co. answered, disclaiming any part in the attempt to collect said bonds, and averring that under the judgment in their above named suit they caused the said bonds to be seized by garnishment process against the sheriff to the extent of \$807. The sheriff answered, setting up the order to sell and his proceedings thereunder, and alleging that the said bonds were taken for the several different amounts to suit the claims of intervening parties, that the assignees of Joseph Hoy & Co. had obtained judgment against him as garnishee for the excess above the claims of said intervenors, that all his acts were in accordance with law and the orders of court, and the plaintiffs having voluntarily executed said bonds can not urge informalities or except to their binding effect, and he prayed that the injunction be dissolved. Several parties intervened, claiming privilege upon the said bonds, and asked that the injunction be dissolved. From a judgment in favor of the defendants the plaintiffs appealed.

Without expressing an opinion as to the validity of the said bonds, we think executions improperly issued upon them, as Article 261 C. P. authorizing the sale, for certain causes, of property under attachment, does not direct the sheriff to take from the purchasers bonds in the nature of judgments, as in sales under executions, and the expression "to have the force and effect of a judgment at law" used in said bonds, must be considered mere surplusage. We know of no law and have been referred to none which gives to such bonds the force of a judgment upon which an execution may issue. We think the injunction should have been maintained without prejudice to the rights of parties upon the said bonds.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be perpetuated, reserving to all parties in interest their rights, if any they have, in or upon the bonds referred to and described in the pleadings herein. The appellees to pay costs in both courts.

No. 4917.

ENOS M. CRAMER v. ALEXANDER V. BROWN.

This is a contest for office. The appeal should have been made returnable within ten days after the judgment. The appeal granted by the District Court was incorrectly made returnable on the second Monday of February, and when the error was discovered the appellant had a proper return day fixed according to law. The motion to dismiss the appeal can not prevail.

Plaintiff, alleging to be the sheriff for the parish of Madison, enjoined defendant from acting or assuming to act as sheriff, from possessing or attempting to possess the books, papers, and archives of the said office, and from intruding or attempting to intrude himself therein. The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception is well taken and should have been maintained. The injunction must be dissolved.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Wells, Spencer, Seale & Harrison, Labatt, Aroni & Clinton*, for plaintiff and appellee. *Crawford & Coleman*, for defendant and appellant.

ON MOTION TO DISMISS.

LUDELING, C. J. The appellee moves to dismiss this appeal on the grounds :

First—That the suit is not a preference case.

Second—That the district judge granted an appeal which was made returnable on the second Monday of February, and the bond was given according to law, and the case was no longer within the jurisdiction of said district court.

Third—That the parish judge had no right to grant an appeal in the case ; and

Fourth—That the parish judge has revoked his order for an appeal.

There is no merit in any of the grounds stated for dismissing the appeal. The first two grounds, if true, might be a reason for not trying the case on the merits, until the second Monday of February next, but not for dismissing the appeal. And the same thing may be said of the third and fourth grounds for dismissal. But we think that this is a contest for office, and the appeal should have been made returnable within ten days after the judgment. The appeal granted by the district judge was incorrectly made returnable on the second Monday of February, and when the error was discovered the appellant had a proper return day fixed, according to law. 10 An. 488 ; 2 An. 484 ; 25 An. E. Evans, wife et al., v. Sauvinet et al.

The motion is therefore refused.

ON THE MERITS.

HOWELL, J. The plaintiff alleges that he is the legally elected and qualified sheriff of the parish of Madison, and as such has been dis-

Cramer v. Brown.

charging the duties and receiving the emoluments thereof; that recently the defendant, pretending to hold a commission for said office and styling himself sheriff of said parish, has disturbed him, plaintiff, in the exercise and enjoyment of his said office, and interfered with and hindered him in the discharge of his duties by holding himself out and pretending to act as the sheriff of said parish; and he prays that he be quieted in the possession of his office; that defendant be ordered to desist from his unlawful interference and enjoined from acting or assuming to act as sheriff, from possessing or attempting to possess himself of the books, papers and archives of the said office, and from intruding or attempting to intrude himself therein.

The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception was referred to the merits and an answer filed alleging a commission, bond and oath as sheriff, and the entering upon the duties thereof with the consent of the plaintiff, and unmolested continuance therein from June 16, 1873, until the institution of this suit in November following. Upon a trial the judge *a quo* decided in favor of the plaintiff, and the defendant appealed.

The exception, in our opinion, was well taken and should have been maintained. This case is similar, in this respect, to that of *Hayes v. Thompson*, 21 An. 655, where the action was dismissed as improperly brought, although no exception was filed. See also *State ex rel. Wickliffe v. Delassize*, 21 An. 710.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction be dissolved and the suit dismissed at the costs of plaintiff, in both courts.

No. 5055.

NEW ORLEANS CANAL AND BANKING COMPANY v. LINN TANNER,
Administrator.

Two of the mortgage notes of the defendant, held by the bank, plaintiff in this case, were about to prescribe, when, in order to avert this loss and to recover the claim, the attorney for the bank presented the petition to the person in possession of the office of clerk of the court and acting as such, and caused due process to issue. This was sufficient to interrupt prescription.

The clerk was a *de facto* officer and his official acts were valid, however indifferent his title to the office.

APPEAL from the Ninth Judicial District Court, parish of Rapides.
Orsborn, J. Manning, for plaintiff and appellant. *James O. White*, for defendant and appellee.

WYLY, J. The plaintiff sues on five promissory notes of Esther P.

Tanner, deceased, whose succession is represented by the defendant, and also to foreclose the mortgage securing their payment. The defense is prescription. There is no doubt that the first note, payable on the fifteenth December, 1867, is prescribed. As to this there is no controversy. The dispute is as to the next two notes, maturing twenty-second February, 1868.

It is not pretended that the last two notes, maturing twenty-second February, 1869, are prescribed.

On the twenty-fourth February, 1873, the day before prescription would accrue on the two notes about which there is a controversy, the plaintiff caused a citation to be served on the defendant. The copy of the petition and the citation, however, were signed by S. A. Ballio, as clerk, holding a commission from Governor Warmoth, of date fourth December, 1872. Ballio was at the time in possession of the clerk's office, together with the records, papers and seal of said office. The seal of the court was affixed to the citation. The controversy is as to the validity of the official acts of Ballio in regard to the plaintiff and the public, who have dealt with him in that capacity.

There is no dispute as to the validity of the official acts of the sheriff.

The defendant contends that Hastmyer, holding commission under Acting Governor Pinchback, was the legal clerk; that Ballio was a usurper and all his official acts are absolute nullities. As before remarked Ballio was, at the time of the citation, the acting clerk in possession of the office, the seal and all the books and papers. He had been for more than a month before and he continued to be acting clerk for several months after the citation in question issued.

After the present clerk O. K. Hawley was appointed by Governor Kellogg and got possession of the clerks' office, the plaintiff caused new process to be issued by him and upon this the case was tried.

The process issued by Ballio is relied on by plaintiff as sufficient to interrupt prescription. And we think it had the effect contended for by the plaintiff.

Two of the mortgaged notes of the defendant, held by the bank were about to prescribe. In order to avert this loss and to recover on the claim the attorney for the bank presented the petition to the person in possession of the office and acting as clerk and caused the process to be issued. He was a *de facto* officer and his official acts were valid, however indifferent his title to the office might be. 3 An. 631; 10 An. 524; 13 An. 404; 13 An. 607; 22 An. 33; 15 Mass. 171, 183; 9 Johnson 135; 16 Peters 71.

It is therefore ordered that the judgment in favor of the plaintiff for the amount only of the last two notes be amended so as to embrace the

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amount of the other two notes maturing twenty-second of February, 1868, one for six hundred and the other for seven hundred dollars, both bearing eight per cent. interest from the twenty-second February 1867, together with recognition of mortgage for said amounts, and as thus amended it is ordered that the judgment be affirmed, appellee paying costs of appeal.

Rehearing refused

No. 3042.

E. T. PARKER v. A. & X. BERNARD.

The plaintiff sues for the sum of \$590 92, the amount of a conditional bond which reads as follows: "That whenever the syndic shall erase the tacit mortgage in favor of the minor Louis Roy, surviving child of Felicien Roy, which exists on the lot of ground and improvements, purchased by Auguste Bernard at the sale of E. T. Parker, syndic v. Joseph Grelier, No. — of the docket of the Second District Court of New Orleans, then and in that case this bond shall have force and virtue."

The defense that the tacit mortgage is not raised can not prevail. It is fully established that by order of court plaintiff paid Grelier the amount of the conditional bond, and that, if the minor ever had a tacit mortgage on the property, it was lost from failure to record the evidences of it prior to the first of January, 1870, under the provisions of the Constitution of 1868.

A PPEAL from the Ninth District Court, parish of Orleans. *Cooley J. W. O. Denegre*, for plaintiff and appellee. *Sambola & Ducros*, for defendants and appellants.

TALIAFERRO, J. At a syndic's sale of an insolvent's estate made by the plaintiff, sheriff and ex-officio syndic, on May 1, 1858, there was adjudicated to one Grelier a certain piece of landed property on Magazine street for \$5210 for which he paid part in cash and for the residue furnished notes. Having failed to pay the last note for \$1953 75, Parker who held the note as syndic, sued out executory process against the property, and on the seventh of August, 1860, adjudicated it to A. Bernard one of the defendants for \$5350 08, of which amount he paid \$4759,08, and for the remainder he executed the bond now sued on for \$590 92. The bond was executed for this reason: Bernard, after the property was adjudicated to him, set up an objection to paying the entire sum bid, on the ground that there existed a tacit mortgage against the property he purchased in favor of a minor child of Mrs. Voiselle, the insolvent, who formerly owned the property; that this mortgage subsisted for the sum of \$590 92, the amount of the bond which was conditioned as follows: "That whenever the syndic shall erase the tacit mortgage in favor of the minor Louis Roy, surviving child of Felicien Roy, which exists on the lot of ground and improvements purchased by Auguste Bernard at the sale of E. T. Parker, syndic v. Joseph Grelier, No. — of the docket of the Second District Court

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of New Orleans, then and in that case this bond shall have force and virtue." This instrument was executed on the nineteenth of September, 1860. Grelier, against whom the executory proceedings had been taken, after the sale and the writ satisfied, took a rule on Parker to pay over to him the balance of the price of adjudication after satisfying the writ. This he did with the exception of the part represented by the bond, and answered that no part of the \$590 92 had ever come into his hands, but that that sum was retained by Auguste Bernard out of the price of the property adjudicated to him on the seventh of August, 1860. Parker called the defendants and Esther Voiselle, tutrix of the minor, in warranty. Bernard answered declaring the mortgage was not erased, etc. The rule was tried in February, 1861, and was made absolute against Parker, who had judgment over against Bernard. An appeal to this court was taken and the judgment against Bernard was reversed. 18 An. 167. The ground on which the judgment was reversed was that it was not shown that Parker had paid the suspended sum due to Grelier.

This suit was instituted on the bond in June, 1866, and the judgment of the lower court was rendered in favor of the plaintiff on the twenty-eighth of April, 1870. The defendants have appealed.

The judgment was correctly rendered; it is fully established that Parker paid Grelier the amount of the bond and that if the minor ever had a tacit mortgage on the property it was lost from failure to record the evidences of it prior to first of January, 1870, under the provisions of the Constitution of 1868.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

Rehearing refused.

No. 5014.

GEORGE COLLINS et als. v. MISSISSIPPI AND MEXICAN SHIP CANAL AND DRAINING COMPANY.

This is made up of separate suits; the judgments were separate; and in none of the cases were \$500 demanded. They were consolidated and taken as it was merely for convenience. It follows that this court has no jurisdiction.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. W. B. Koontz*, for plaintiffs and appellees. *Rice & Whitaker*, for Van Orden, appellant. *George S. Lacey*, City Attorney, for the city of New Orleans, garnishee.

MORGAN, J. The plaintiffs, seven in number, instituted separate suits against the defendant and obtained judgment. Neither of the

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claims sued upon amounted to \$500. They then garnisheed the city, and subsequently traversed the answers. The rule traversing the answers was taken in the cases as they were numbered, but was expressed in one motion. Judgment was rendered against the garnishees, who have appealed.

The suits were separate, the judgments were separate, and in none of the cases was \$500 demanded. The rule, although written on one piece of paper, mentions each case by its number separately, and must, we think, be considered as a separate rule in each case, and taken as it was merely for convenience. It follows that we have no jurisdiction. The motion to dismiss must prevail.

Appeal dismissed.

No. 5030.

P. A. SIMMONS, President Police Jury, and CHARLES LEROY, Treasurer, Parish of Natchitoches, v. D. H. BOULLT, Tax Collector.

The predecessors of the plaintiffs, who administered the offices of police jurors and parish treasurer during the years 1867, 1868, 1869, 1870, 1871 and 1872, had authority to settle with the defendant for parish taxes collected by him during those years. If they permitted him to settle without taking the oath required by law, that he had not speculated in parish funds, this fact can not invalidate the settlements, although it shows a dereliction of duty on the part of those administering the parish as a municipal corporation. These settlements are final.

After partial settlements made in April and May, 1873, for parish taxes collected during that year, defendant owing a certain balance thereof due up to the first of July of the same year, tendered it in parish warrants to the parish treasurer, who properly refused to receive them, because the tender was not accompanied with the oath required by law. Failing to verify by his oath that the warrants tendered were actually received by him from the taxpayers, the defendant should have tendered United States currency to the amount due by him.

A special tax having been levied and collected to pay judgments against the parish, plaintiffs claim judgment against defendant for the full amount thereof on the ground that, as tax collector, the defendant had no authority to pay the same to the judgment creditors, it being his duty to pay over all funds collected by himself for the parish to the parish treasurer, to be disbursed by that officer according to law.

There is no doubt that this was the duty of the defendant; but as he applied the sum aforesaid to the discharge of the judgments for which said sum was assessed and collected, this court fails to perceive any injury that has resulted to the parish from this irregular proceeding. It would be inequitable for the plaintiffs to recover judgment against the defendant for said amount; for, after all, the funds received their proper destination, though the channel through which they passed was not the right one.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J.* Jury trial. *Jack & Pierson*, for plaintiffs and appellees. *Levy & Pierson, Chaplin & Sons, Morse & Dranguet*, for defendant and appellant.

WYLY, J. The plaintiffs sue the defendant for \$10,211 61 for the balance due by him for general parish taxes collected by him for the years 1867 and 1868; for \$5364 33, for balance due for the year 1869; for \$16,640, for parish taxes for 1871; for \$22,650, for parish taxes for

1872; for the amount of parish taxes collected by him for the quarter ending July 1, 1873; and for \$167,000, the amount of special taxes collected, in currency, in 1869, 1870, 1871 and 1872, to pay judgments against the parish. They also sue to annul the settlements made by the defendant with the parish treasurer during the years 1871 and 1872. And they allege that said settlements were made in parish warrants, which were illegally issued and not such as he actually received from the taxpayers; that he bought up said warrants at a low price to be used in said settlements; and that in making said settlements he failed to make oath that he had not speculated in the funds of the parish. They further allege that the defendant during the years 1869, 1871 and 1872, collected large sums in currency from the taxpayers in settlement of general parish taxes which he has withheld from the parish treasury, paying over instead thereof, worthless, spurious and illegal warrants.

The court gave judgment, on the verdict of a jury, against the defendant for \$40,000, and he has appealed.

The predecessors of the plaintiffs, who administered the offices of police jurors and parish treasurer during the years 1867, 1868, 1869, 1870, 1871 and 1872, had authority to settle with the defendant for parish taxes collected by him during those years; and the receipts which are in evidence show that the defendant has fully settled for the taxes collected by him during those years. That they permitted him to settle without taking the oath required by law, that he had not speculated in parish funds, can not invalidate the settlements, although it shows a dereliction of duty on the part of those administering the parish as a municipal corporation. We regard these settlements as final.

It is shown that the defendant made partial settlements in April and May, 1873, for parish taxes collected by him during that year, and that up to first July, 1873, he owed a balance of \$1890 17, which he tendered in parish warrants to the parish treasurer. We think the parish treasurer properly refused to accept the warrants, because the tender was not accompanied with the oath required by law. Failing to verify by his oath that the warrants tendered were actually received by him from the taxpayers, the defendant should have tendered United States currency to the amount due by him as aforesaid for the quarter ending July 1, 1873.

For this amount there should be judgment against the defendant.

A special tax was levied to pay judgments against the parish during the years 1869, 1870, 1871 and 1872, amounting in the aggregate to \$147,856 31.

On this assessment it is shown that the defendant collected in currency \$95,634 33.

 Simmons and Leroy v. Boult.

Retaining his commissions, \$9563 43, the defendant paid over the balance, \$86,202 66, to the judgment creditors.

The plaintiffs concede that payments to this amount were made by the defendant, and that the judgments against the parish were reduced to that extent; but they claim judgment against him for the full amount thereof, on the ground that, as tax collector, the defendant had no authority to make said payments, it being his duty to pay over all funds collected for the parish by him to the parish treasurer, to be disbursed by that officer according to law.

There is no doubt it was the duty of the defendant to pay over the funds in question to the parish treasurer; but having applied the \$86,202 66 to the discharge, in part, of the judgments for which said sum was assessed and collected, we fail to perceive that any injury has resulted to the parish from this irregular proceeding, and we think it would be inequitable for the plaintiffs to recover judgment against the defendant for said amount. For after all, the funds received their proper destination, though the channel through which they passed was not the right one.

There are many interesting questions discussed in the elaborate briefs filed by the learned counsel engaged in this litigation, which from the view we have taken of the subject it becomes unnecessary to consider.

It is therefore ordered that the judgment herein for \$40,000 against the defendant be reduced so as to amount to \$1890 17, and as thus amended that it be affirmed. It is further ordered that appellees pay costs of this appeal.

Rehearing refused.

 No. 5032.

FREDERIC FLUKE v. MRS. MARY A. MARTIN.

The plaintiff sues defendant for the balance of an account for supplies furnished to make a crop, which he alleges inured to her benefit. It was incumbent on plaintiff to prove that the articles thus furnished had inured to the benefit of defendant, as alleged, but he has failed to do so. Besides, this court is satisfied as to the correctness of the defense—which is—that the debt is a community debt for which the defendant, who was a married woman, can not be held responsible.

APPEAL from the Ninth Judicial District Court, Parish of Rapides. *Bowman*, Judge *ad hoc*. *R. A. Hunter*, for plaintiff and appellee. *T. O. Manning*, for defendant and appellant.

HOWELL, J. The plaintiff sues Mrs. Martin for the balance of an account for supplies furnished for the use of the plantation to make the crop of 1866, which he alleges inured to the benefit of the defendant.

Fluke v. Mrs. Mary A. Martin.

The defense is that the debt is a community debt for which the defendant, who was a married woman, can not be held responsible.

It was incumbent on the plaintiff to prove that the articles furnished by him inured, as he alleges, to the separate advantage of the defendant, in which however, we think, he has failed. The land, it is shown, was the separate property of defendant, but the admission that there existed a community between herself and her husband and other proof in the record satisfy us that the cultivation of the crop was under the control of the husband and the debt in suit is a community debt.

It is therefore ordered that the judgment appealed from be reversed and there be judgment in favor of the defendant with costs in both courts.

Rehearing refused.

No. 3095.

C. S. SAUVINET v. THOMAS S. MAXWELL.

An incoming sheriff has not the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs and for which the outgoing sheriff and sureties are liable on his official bond.

It will hardly be held that when a sheriff becomes *functus officio* he can execute writs and process of courts in his possession remaining unexecuted. His mission is completed and his authority to actively enforce the laws is at an end. But there is no impropriety or unfitness in his paying over moneys which he has in hand to the party legally entitled to receive it. He is responsible for it and not the incoming sheriff, and the right of the latter is unwarranted by law.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble J. E. Filleul, Hornor & Benedict*, for plaintiff and appellee. *A. N. & H. N. Ogden*, for defendant and appellant.

TALIAFERRO J. At the general election of the State in November 1870, the plaintiff was elected sheriff of the parish of Orleans. He complains that on coming into office he found that the defendant his predecessor had taken away all the public records of the sheriff's office, the books, papers, writs and processes of every kind. He obtained an order of court to regain possession of the archives of the office and to restrain the defendant from interfering with him in the discharge of his official duties. Under this order all the records, books, papers, etc. were returned, but the defendant refused to deliver to the plaintiff the moneys that had come into his hands while in office as sheriff and which belonged to parties in various cases. From the order in its entirety the defendant has appealed.

The only question left for consideration is: Has an incoming sheriff the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs and for which the outgoing sheriff

Savinet v. Maxwell.

and his sureties are liable on his official bond? The judge *a quo* found from an extensive examination of common law authorities that they established the doctrine that the outgoing sheriff should continue and complete any execution he may have begun; and according to this rule he deduced that the defendant would be in the right in holding all moneys realized by him on writs until paid to the creditor or taken possession of by the court from which the writ issued. But the judge was unable to find that this question has heretofore been directly presented to the courts of this State for adjudication. He found no reported case touching the issue and seems to have been governed in rendering his decision by inferences from a few cases (10 An. 310—12 An. 340 and 7 Rob. 500), that bear in his opinion, indirectly on the subject, and from his views of the genius and character of our government. It will scarcely be held that when a sheriff becomes *functus officio* he can execute writs and process of courts in his possession remaining unexecuted. His mission is completed and his authority to actively enforce the laws is at an end. But we see no impropriety or unfitness in his paying over moneys which he has on hand to the party legally entitled to receive it. He is responsible for it and not the incoming sheriff, and the right of the latter is unwarranted by law. We think therefore the judge *a quo* erred.

It is accordingly ordered and adjudged that the judgment of the district court be annulled and avoided. It is further ordered that there be judgment for the defendant, the plaintiff paying costs in both courts. Rehearing refused.

No. 5024.

WILLIAM L. MORGAN & CO. v. POLICE JURY OF THE PARISH OF RAPIDES.

The police jury of the parish of Rapides is a political corporation of limited powers. Under authority to clear the banks of navigable rivers "for the purpose of securing a free passage for boats and other small river craft," R. S. sec. 2743, the police jury can not remove nor break up the woodyard of the plaintiffs, established years ago, and which in no manner interferes with the free navigation of Red river.

The police jury has authority to control the roads of the parish, Revised Statutes, sec. 3364, but the ordinance complained of does not profess to have been passed, and obviously was not passed, in the exercise of this power. Besides, a sufficient ground to defeat the pretensions of the police jury is that they have no authority to deprive plaintiffs of the right to pursue their occupation as keepers of a woodyard, which is not alleged to encroach on any public road.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J.* William A. Seay, for plaintiffs and appellants. *R. P. Hunter*, District Attorney *pro tem.*, for defendants and appellees.

WYLY, J. The plaintiffs, the owners of a woodyard in front of their

property in the unincorporated village of Pineville, on Red river, injoin the police jury of the parish of Rapides from enforcing the ordinance adopted by said body, prohibiting, under penalty of fine and imprisonment, the petitioners from keeping for a certain period more than fifty cords, and prohibiting them absolutely from keeping wood for sale after a certain day, to wit: first January, 1874.

The court dissolved the injunction and the plaintiffs appeal.

It is proved that the woodyard does not in the least interfere with or obstruct the navigation of Red river, or the landing and taking on of freight for the inhabitants, nor is it shown that it encroaches upon or obstructs the public road laid off on the bank of the river. The parish of Rapides is a political corporation of limited powers; and looking to the statutes conferring these powers, we fail to find authority for the police jury to pass the ordinances complained of.

Under authority to clear the banks of navigable rivers, "for the purpose of securing a free passage for boats and other small river crafts," Revised Statutes, sec. 2743, the police jury can not remove or break up the woodyard of the plaintiffs, established years ago, and which in no manner interferes with the free navigation of the river. There is no other statute giving the police jury authority in regard to the navigation of the rivers.

They have authority to control the roads of the parish, Revised Statutes, sec. 3364, but the ordinance complained of does not profess to have been passed, and it obviously was not passed in the exercise of this power. If the police jury have authority to prevent the plaintiffs from keeping a woodyard in front of their property in the unincorporated village of Pineville, they can likewise prevent the establishment and administration of a woodyard in any other part of the parish; and thus they can arbitrarily break up the legitimate occupation of those engaged in supplying boats with fuel, and, to that extent, aiding in the navigation of Red river. But a sufficient ground to defeat the pretensions of the police jury is, they have no authority to deprive the plaintiffs of the right to pursue their occupation as keepers of a woodyard. If this woodyard encroaches upon the land laid out as a public road, of course the police jury can cause the entire road to be opened and remove whatever obstruction there may be to said road.

It is therefore ordered that the judgment herein be annulled, and it is now ordered that there be judgment perpetuating the injunction in this case, appellees paying costs of both courts.

Pottier v. Grant and Bell.

No. 3087.

H. POTTIER v. DAVID GRANT and W. R. BELL.

In October, 1867, David Grant enjoined the execution of a judgment which his partner, George McGibbon, had confessed against the commercial firm of Grant & McGibbon in favor of R. C. Hyatt, and the defendant, W. R. Bell, signed as security the injunction bond. Before the trial of the injunction suit, Hyatt transferred to the plaintiff, H. Pottier, all his right, title and interest in and to the judgment. The injunction was subsequently dissolved by a judgment in the court below which, on appeal, was affirmed in this court.

This suit is brought by Pottier, the transferee, to recover damages on the injunction bond. It is contended by defendants that there is no privity between them and the plaintiff, because the bond is not in his favor, and the right to claim damages for the illegal injunction was not transferred to plaintiff together with the transfer of the judgment enjoined.

This defense is not well founded. The injunction suit passed as an accessory to the plaintiff with the judgment he bought from Hyatt. After said purchase the plaintiff alone had an interest in resisting the injunction which had but a short time before been taken out, and became the real defendant in said suit, because he was the owner of the judgment enjoined, and the injunction bond, although in favor of Hyatt, must be held to be in favor of the owner of said judgment, who acquired the essential right to execute it and also to claim damages for the illegal restraint of the exercise of that right.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux & Fenner*, for plaintiff and appellee. *Bartlette, Rose-lus & Philips*, for defendants and appellants.

WYLY, J. The defendants, the principal and the surety, on an injunction bond in the case of David Grant v. R. C. Hyatt and sheriff, appeal from the judgment condemning them *in solido* to pay the plaintiff \$1314 48, the amount of general and special damages alleged to have been suffered by him by reason of said injunction.

It appears that in October, 1867, David Grant enjoined the execution of the judgment which his partner, George McGibbon, had confessed against the commercial firm of Grant & McGibbon in favor of R. C. Hyatt, and that William R. Bell, the defendant, signed as surety the injunction bond. Before the trial of this suit R. C. Hyatt transferred to the plaintiff, H. Pottier, all his right, title and interest in and to the judgment enjoined.

The injunction was subsequently dissolved in the lower court and on appeal the judgment was affirmed by this court. 22 An. 411.

The important question is : Can the plaintiff, the transferee of the judgment enjoined by the defendants, recover damages on the injunction bond subscribed by them in favor of R. C. Hyatt and sheriff ?

On the part of the defendants it is contended that there is no privity between them and the plaintiff, the bond not being in his favor and the interest of Hyatt in the injunction suit, to wit: The right to claim damages for the illegal injunction, not having been transferred to the plaintiff together with the transfer of the judgment enjoined. And in support of this position they cite the case of *Tete v. Villavasa*, 6 An.

271. On the other hand the plaintiff contends that the judgment having been transferred to him immediately after the injunction, the suit last named was really conducted by the defendants contradictorily with him until it was finally decided two years thereafter by this court; that he was the real defendant during all the litigation of the injunction suit and he was the real party damaged thereby, although Hyatt was the nominal defendant. We are of the opinion that the injunction suit passed as an accessory to the plaintiff with the judgment he bought from Hyatt. In acquiring the judgment he necessarily acquired the right to execute the same, and also to resist the injunction of the defendants restraining the exercise of this right. That after said purchase the plaintiff alone had an interest in resisting the injunction which the defendants but a short time before had taken out; and that he became the real defendant in said suit, because he was the owner of the judgment enjoined. And the injunction bond, although in favor of Hyatt, must be held to be in favor of the owner of the judgment enjoined. The transfer of the judgment would have been a vain thing, if it did not carry with it the essential right to execute it and also to claim damages for the illegal restraint of the exercise of this right by the injunction of the defendants.

For nearly two years after the plaintiff bought the judgment from Hyatt the defendants kept up the litigation of the injunction suit, restraining the plaintiff from executing his judgment and otherwise greatly damaging him. If they can escape liability to him, they will escape all liability; because Hyatt, the former owner, can not recover from them damages which he did not suffer, but which were incurred by the plaintiff. The defendants would thus be permitted to damage the owner of a judgment by the illegal exercise of the writ of injunction and incur no liability whatever on account thereof.

The case of *Tete v. Villavosa*, 6 An. 271, is not like the one now before the court. There the injunction was dissolved with damages before the transfer of the original judgment by Cantrelle & Villavasa to the Ocean Insurance Company. At the time of the transfer Cantrelle & Villavasa had two judgments, one for the amount of their original demand against their judgment debtor, and the other for the amount of damages which they incurred by the illegal injunction taken out by their judgment debtor. They only transferred the original judgment. And when they sought to enforce their other judgment for damages, the judgment debtor enjoined on the ground that he had settled it with the transferee of the original judgment; and that the transfer of the original judgment carried with it as an accessory the judgment for damages.

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The court correctly held that the judgment for damages did not pass as an accessory with the sale of the original judgment. Here Hyatt transferred the original judgment very soon after the injunction was taken out; and the two years' litigation of the last named suit was contradictorily with the plaintiff, the transferee of Hyatt, who was restrained during this period in the exercise of his legal right and who suffered the damages resulting from the illegal injunction. In the case cited the transferee suffered no damage and was not restrained in the exercise of a legal right, because the injunction had been dissolved with damages before said transfer. Here, however, the plaintiff was the real party in the two years' litigation of the injunction suit and he has suffered the damages of which he complains.

Judgment affirmed.

No. 5052.

MRS. JULIA SCOTT AND HUSBAND v. THE WORLD.

At a succession sale of the property of the estate of Horace Groves, deceased, made in the parish of Tensas on the eighteenth of April, 1868, a certain tract of land was adjudicated to E. Slicer. He afterwards sold the land to Mrs. Julia Scott, who obtained a monition in the parish of Tensas to secure her title, and said monition was homologated by judgment of the district court on the twentieth of October, 1873, from which judgment an appeal has been taken by certain heirs of the deceased, on the ground that said succession had been fraudulently opened in the parish of Tensas, when it was well known that it had been opened and was being administered in the parish of Madison, where the land in question was situated, before its being subsequently located in the parish of Tensas, in consequence of a change of boundaries by virtue of an act of the Legislature.

In this case, Mrs. Julia Scott seeks by a monition taken out in the parish of Tensas to defeat a claim set up against her in the district court of the parish of Madison for the very tract of land sought to be disencumbered of all adverse claims by the monition. To this petitory action of the appellants in the district court of the parish of Madison, Mrs. Scott had answered, and when this suit was in progress in the proper court, she applied for a monition in another parish. It would be subversive of all propriety of legal proceeding if Mrs. Scott could by a flank movement of this sort conclude the rights of the appellants and confirm irrevocably her title to the land.

The appellants are not therefore affected by the judgment homologating the monition. Their judicial demand, claiming to be the owner of the land, was to all intents and purposes an effectual notice to Mrs. Scott, as if they had presented themselves in the parish of Tensas and made a formal opposition to the monition.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Thomas P. Farrar*, for appellees. *E. D. Farrar and John Ray*, for appellants.

TALIAFERRO, J. This case is brought up by an appeal taken from a judgment of the district court homologating a monition. The history of this litigation seems to be as follows: At a succession sale of the property of the estate of Horace Groves, deceased, made in the parish of Tensas on the eighteenth of April, 1868, a tract of land containing

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three hundred and twenty-four acres, more or less, was adjudicated to one J. Edwin Slicer at the price of \$486. Subsequently, in December, 1870, Slicer sold the land to Mrs. Julia Scott. In the sheriff's *proces verbal* of sale the land is designated as "lots or fractional sections forty-six and forty-seven of township fifteen north, of ranges nine and ten east." In September, 1873, Mrs. Scott, alleging there was error in the description of the land by the sheriff in his deed to Slicer, the land sold constituting lots or fractional sections forty-six and forty-seven of township fifteen north, of range thirteen east, petitioned the district court of the parish of Tensas for a monition to quiet her title to the land under the proper description, and by that means to correct the error of description made in the sheriff's deed. The monition was granted, and after advertisement of thirty days it was homologated by judgment of the district court rendered on the twentieth of October, 1873.

The appeal from this judgment was taken by Rachael Lee Groves and Catherine Groves, the wife of one McDonald. These appellants represent themselves as being residents of Ohio county, State of West Virginia. They allege that they are the children and only heirs of Horace Groves, deceased, late of the parish of Madison, Louisiana; that their father at his decease left as part of his succession a tract of land with improvements upon it lying within the parish of Madison, as the boundaries of that parish existed at the opening of their father's succession; that long subsequent to that time, by an act of the State Legislature, a change was made in the location of the division line between the parishes of Madison and Tensas, by which the land in question was included within the newly established boundaries of the parish of Tensas. They allege that subsequent to this change of boundary, their uncle, one Elijah W. Groves, fraudulently caused the succession of their father to be opened anew in the parish of Tensas, well knowing that it had been opened in the parish of Madison, and was then being administered there; that by means of this fraudulent proceeding he caused the land of their father's succession to be sold under color of judicial proceeding, and through an interposed person became the owner thereof in the name of his wife, Julia M. Scott, who, after the death of Elijah W. Groves, intermarried with one George T. Trezevant, and still claims and holds possession of said land. They allege that in the year 1872, the appellants being both minors, their mother and guardian instituted a petitory action for the recovery of the aforesaid land; that Julia Scott and husband were made parties to that suit and duly cited; that they have answered, and that the suit is now pending; that after the said parties had been cited and made answer, and before a final trial could be had in the ordinary course of

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litigation, they took out the monition fraudulently and surreptitiously, without the knowledge of the appellants, and when they were utterly ignorant of the proceeding; that they caused the monition to be homologated contrary to law for the following reasons:

First—The parties were not entitled to the monition, a suit against them actually pending for the property which they seek to obtain title to by an *ex parte* proceeding in the form of a monition.

Second—That the judgment of homologation was rendered on the first day of the term, which was irregular for the reason that being in the nature of a citation, no legal action could be taken on it that day.

Third—That the monition was granted by the parish judge, who is not authorized by law in matters of monition to render orders in the absence of the district judge.

Under the facts and circumstances of this case, the monition can not avail Mrs. Scott as against the appellants. Here the party seeks by a monition taken out in the parish of Tensas to defeat a claim set up against her in the district court of the parish of Madison, for the very tract of land sought to be disencumbered of all adverse claims by the monition. To this petitory action of the appellants Mrs. Scott has answered, and the suit is in process in the proper court, and was so when she applied for the monition. It would be subversive of all propriety of legal proceedings if she could by a flank movement of this sort conclude the rights of the appellants and confirm irrevocably her title to the land. The appellants are not affected by the judgment homologating the monition. They had, before the monition was applied for, come forward and made known by a formal judicial demand, claiming to be the owners of the land and denying all title to it in Mrs. Scott, the grounds upon which they objected to her being quieted and confirmed in her claim. This was to all intents and purposes as effectual notice to Mrs. Scott as if they had presented themselves in the parish of Tensas within the thirty days required, and asserted their title by a formal opposition.

The second and third points made by the appellants it becomes unnecessary to examine.

It is therefore ordered that the judgment appealed from be and it is hereby decreed and declared to be null and inoperative as regards the rights and claims of the appellants to the land in controversy, and the judgment homologating the monition is in that respect amended. It is further ordered that as thus altered and amended the judgment be affirmed, the appellees paying costs of this appeal.

Rehearing refused.

State ex rel. Attorney General v. Accommodation Bank of Louisiana.

No. 4784.

STATE ex rel. ATTORNEY GENERAL v. ACCOMMODATION BANK OF LOUISIANA.

The important question in this case is: Has act No. 77, of the legislative session of 1870, entitled "An Act to authorize the stockholders of the Loan and Pledge Association" to change the name of the incorporation, and to grant certain privileges to said association, been properly accepted?

The answer must be in the negative. The acceptance of an act which fundamentally changed the character of the institution, should have been by the unanimous consent of the stockholders. The assent which was given by a majority is not sufficient.

Legislative alterations of the charter of a private corporation, when merely auxiliary and not fundamental, may be adopted by a majority of the corporators, and such acceptance will bind the whole; but if such alterations be fundamental, the acceptance must be unanimous.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, *John Ray, Cotton & Levy*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

WYLY, J. On thirty-first October, 1868, the Legislature passed act No. 212, entitled "An Act to incorporate the Loan and Pledge Association." The object of the association was to loan money on pledge of movable property.

On ninth March, 1870, they passed act No. 77, entitled "An Act to authorize the stockholders of the Loan and Pledge Association to change the name of the incorporation and to grant certain privileges to said Association." Section 4 of said act provides that "the said Association shall have power to receive money on deposit, and shall have and exercise all the privileges of private banks."

This suit was brought by the Attorney General, under the intrusion act, against the defendants, on the ground that they are exercising the powers conferred by act No. 77 without having legally accepted the same, and therefore they are exercising the functions of a banking corporation without being legally incorporated. The defendants pleaded the general denial and alleged that act No. 77, entitled "An Act to authorize the Loan and Pledge Association to change the name of the incorporation and to grant certain privileges to the said Association," has been complied with in every respect.

The important question is, has act No. 77 been properly accepted?

The alteration proposed by this act to the charter of the Loan and Pledge Association fundamentally changes its character. Instead of merely to loan money at a certain rate of interest on movable property, the corporation, under the amendment proposed, is authorized to receive deposits and to do a general banking business. The acceptance of this grant should have been by the unanimous consent of the stockholders. The assent of a majority, which was given, was not sufficient.

State ex rel. Attorney General v. Accommodation Bank of Louisiana.

Legislative alterations of the charter of a private corporation when merely auxiliary and not fundamental, may be accepted by a majority of the corporators, and such acceptance will bind the whole; but if such alterations be fundamental, the acceptance must be unanimous. *Woolfolk v. Union Bank*, 3 Caldwell's Reports, page 489: "The assent of the subscribers must be obtained to any amendment of the charter which materially or essentially alters the conditions upon which the original contract of the parties was made." 11 Georgia 433. See also 2 Metcalf 314.

It is therefore ordered that the judgment herein in favor of the plaintiff be affirmed with costs.

No. 5021.

MARIA L. BARRON v. J. F. SOLLIBELLOS.

26	289
47	1058
47	1273
47	1275

It can not be contested that a married woman has a right to compromise a law suit pending against herself; and transactions have, between the interested parties, a force equal to the authority of the things adjudged.

It is difficult to imagine, in this instance, how it can be pretended that the money loaned by Sollibellos, the defendant in injunction, for enabling Mrs. Barron to effect a compromise about a suit brought against her, did not inure to her benefit, nor can she be listened to when saying that the debt on which she has been sued, was the debt of her husband, when the contrary is proved by the compromise thus agreed to with a view of putting an end to that law suit.

The interventions were improperly allowed in an injunction suit which was to prevent a sale. If the intervenors have privileges, they can only enforce them upon the proceeds of the sale of the property in the hands of the sheriff; and if any part of the property seized is claimed to belong to some one else than the debtor who enjoined, that claimant's remedy is by injunction obtained according to law.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. M. Ryan, R. T. Bowman, Hudson & Fearn*, for plaintiff and appellee. *R. P. Hunter*, for defendant and appellant. *W. A. Seay*, for intervenors.

LUDELING, C. J. This is an injunction suit to prevent the execution of the *feri facias* issued under a judgment by confession made by the plaintiff, a married woman, in favor of Joseph F. Sollibellos.

The facts disclosed by the evidence on the record are that the plaintiff and her sister owned a plantation; that James Barron managed the plantation, and that in 1868 Ar. Miltenberger, the commission merchant who had furnished said plantation, had an account for \$27,924 67, which he claimed was due by Mrs. Barron and her sister, and he instituted suit thereon against them in the United States Court at New Orleans. Judge M. Ryan was employed by Mrs. Barron and Miss Barron to defend the suit, and James Barron went down to New Orleans to attend to the suit. On his way to New Orleans he traveled with Mr. Joseph M. Sollibellos, a friend, who interested himself to

effect a compromise of that suit. A compromise was entered into between Miltenberger and Barron, Judge Ryan, the attorney of the defendants, being present, by which the suit pending in the United States Court was dismissed, on condition that \$7500 cash should be paid to Miltenberger, and a confession of judgment in his favor for \$2500 should be given at the next term of the district court in Rapides parish. Joseph M. Sollibellos advanced the \$7500 to pay Miltenberger, with the understanding that for that amount Mrs. Barron should confess judgment in his favor. At a term of the district court held in the parish of Rapides in May, 1869, Mrs. Barron confessed judgment in favor of Sollibellos for the amount loaned by him, and the judgment appears to have been written up by her former attorney. Subsequently, in October, 1873, when Sollibellos attempted to enforce this judgment Mrs. Barron enjoined the execution, on the ground that the debt confessed was her husband's, and that the judgment was therefore a nullity.

The simple question presented for decision is, can a married woman compromise a law suit pending against herself? We apprehend no one will dispute her right to do so. And "transactions have, between the interested parties, a force equal to the authority of the things adjudged." It is difficult to imagine how it can be pretended, that the money loaned by Sollibellos, for the purpose of enabling the compromise to be effected, did not inure to her benefit. Nor can she be listened to when saying that the debt, on which Miltenberger had sued her, was the debt of her husband, for by the compromise they agreed to put an end to that law suit, to adjust their *differences* by mutual consent, in the manner which they agreed on and which each party preferred to the hope of gaining, balanced by the danger of losing.

The injunction was, therefore improvidently issued.

M. Ryan intervened in the suit and claimed a part of the mules seized, and G. W. Sentelle & Co. also intervened and claimed a vendor's privilege on all the mules and a privilege upon the crop. There was judgment in favor of the plaintiff in injunction and rejecting the intervenors' claims, and they and the defendant have appealed.

The interventions were improperly allowed in an injunction suit, which was to prevent the sale. If the intervenors have privileges they can only enforce them upon the proceeds of the sale of the property in the hands of the sheriff; and if any part of the property seized is claimed to belong to some one else than the debtor who enjoined, that claimant's remedy is by injunction obtained according to law.

It is therefore ordered and adjudged that the judgment perpetuating the injunction be annulled, and that there be judgment against the plaintiff in injunction and her sureties, *in solido*, and in favor of Joseph

Maria L. Barron v. Sollibellos.

F. Sollibellos, dissolving the injunction and for ten per cent. on the amount of the judgment enjoined as general damages, and costs in both courts.

It is further ordered that the judgment rejecting the intervenors' claims be reversed, and that there be judgment against them as in case of nonsuit, and for the costs of said intervention.

HOWELL, J., *dissenting*. As I understand articles 2398, 2412 R. C. C. and the jurisprudence relating thereto, I do not think a wife can any more bind herself, by the compromise of a suit against her for a draft of her husband, than she can by confessing judgment in such suit.

The law declares that she can not bind herself for debts contracted by him before or during the marriage, and this she can not do either directly or indirectly. The marital influence is just as potent in effecting a compromise, as a confession of judgment or execution of a notarial act, by which the wife is sought to be made responsible for a debt of the husband or community.

What can not be done directly can not be done indirectly, and a third person advancing or loaning the money to the wife for effecting a compromise of such a debt or suit obtains no more right against the wife than the original creditor.

I therefore dissent in this case.

Rehearing refused.

No. 5137.

C. E. GIRARDEY CO. v. THE CITY OF NEW ORLEANS.

Where the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court, the motion to dismiss the appeal must prevail.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Fellowes & Morphy*, for plaintiffs and appellees. *A. O. Lewis*, Assistant City Attorney, for defendant and appellant.

ON MOTION TO DISMISS.

TALIAFERRO, J. The defendant being sued for one thousand dollars, the amount of four months rent of a certain building leased to the city by the plaintiffs at the rate of two hundred and fifty dollars per month, admitted the correctness of the claim but averred that the city, in order to use the leased building, was compelled to expend the sum of two hundred and seventy-five dollars in repairs on the roof, the plain-

26	291
48	676

26	291
51	1680

tiffs having refused to make the repairs after being requested to do so. The court below rendered judgment for the whole sum claimed. The defendant appealed. The motion to dismiss is on the ground that the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court. The motion must prevail. C. P. 567. 5 Rob. 447. 4 An. 407.

It is ordered that the appeal be dismissed at costs of the appellant.

No. 5025.

MRS. EMILY M. ARCHINARD, Widow, v. MRS. LOUISE BOYCE, Wife of
POWHATAN CLARK, Intervenor, and HENRY A. BOYCE.

The act by which the annuity for life claimed in this suit was established, seems to have been a compromise between the parties interested in the succession of plaintiff's husband—one of the conditions being that she should withdraw her application to be appointed administratrix thereof, and that the payment of said annuity might be made either by Henry Boyce or the heirs of Mrs. Irene Boyce. This agreement was subsequently carried out by them partially by making payments thereon.

This is a contract which the parties could legally make. They are bound by it. The loss to the defendants of the property of the succession of Irene Boyce can not affect plaintiff's rights. It was a clear transfer of the interests in and to their succession, which she had the right to sell and the defendants to purchase. If the property perished, or was taken from them, the loss was theirs.

But there is error in that part of the judgment which condemns Powhatan Clark, the husband of one of the defendants. He was not a party to the contract, and his wife entered into it before he married her. The property claimed in his intervention can not be made responsible for his wife's obligation contracted before marriage. The community which had existed between them had been dissolved.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. T. Hunter*, for plaintiff and appellee. *W. W. Whittington* and *J. G. White*, for defendants and appellants and for intervenor.

MORGAN, J. Plaintiff claims from Henry A. Boyce and Mrs. Louise Boyce, wife of Powhatan Clark, and from Clark, her husband, \$900. She alleges that the defendants, heirs of Mrs. Irene Boyce, upon attaining their majority, assumed the obligations of an agreement made between herself and Henry Boyce, their father, to pay her an annuity of \$300, and that this annuity for the years 1871, 1872 and 1873 is now due and unpaid.

Henry Boyce, one of the defendants, was personally cited. Mrs. Clark and her husband, being absentees, were proceeded against by attachment, and property belonging to them was taken into possession by the sheriff.

The Citizens' Bank intervened, claiming a privilege upon a certain portion of the property attached, but as no one complains of the judg-

Mrs. Emily M. Archinard, v. Mrs. Louise Boyce and Henry A. Boyce.

ment, in so far as it passes upon its rights, there is no need to notice it further.

Powhatan Clark, the husband of Louise Boyce, and her co-defendant, intervened and claimed that the property attached is his, and that it is not liable for the debt or claim of the plaintiff and can not be taken or held therefor.

Henry Boyce and Louise Clark, and Powhatan Clark, her husband authorizing her thereto, aver that they have been divested of all the property upon which the pretended annuity or charge in favor of the plaintiff was based; that this property consisted of a large plantation and slaves, and that it rested under a mortgage for a large amount in favor of the Citizens' Bank to secure a debt contracted by their ancestors, which was standing against the property before they came into possession of it, and long before the contract for an annuity now sought to be executed against them was entered into, and that it has been sold to satisfy this indebtedness. They aver further that they have now no means or income with which to pay the same, even if they were bound to do so, a fact which they deny.

There was judgment against them, and they have appealed.

The act under which the annuity is claimed from these defendants recites that it is "an agreement entered into by and between Mrs. Emily Archinard and Henry Boyce, tutor and attorney in fact, in which capacity he is representing herein the heirs of Mrs. Irene Boyce, deceased." Although the act is silent upon the subject, we assume, and the assumption is based upon the statements in defendant's brief, that the minor was Henry A. Boyce, and that the major was Louise Boyce, wife of Clark.

It is not necessary for us to consider whether, as tutor, Henry Boyce had the power without the authority thereto given to him by the judge of the minor's domicile, upon the advice of a family meeting, to bind his ward, inasmuch as it is alleged, and we think established, that when he reached the age of majority he assumed the obligation contracted for him by his tutor. The document by which this assumption was evidenced was destroyed by fire, but the plaintiff swears to it, and the defendants have not offered by their own testimony to contradict her. The same is to be said of Louise Boyce. If her father was not authorized to represent her in the original contract, she bound herself by the second contract, and the question now to be decided is whether the plaintiff can recover?

The act by which the annuity was established seems to have been a compromise between the parties interested in the succession of plaintiff's husband, one of the conditions being that she should withdraw the application which she had made to be appointed administratrix

Mrs. Emily M. Archinard, v. Mrs. Louise Boyce and Henry A. Boyce.

thereof. This was a contract which she was authorized by law to make. The condition of her renunciation was that Henry Boyce should pay her an annuity of \$300 during her life, provided that the payment thereof might be made either by Henry Boyce or the heirs of Mrs. Irene Boyce.

It was this contract which was ratified by Henry A. and Louise Boyce, and the obligations thereof assumed by them. It was subsequently carried out by them partially by making payments thereon. They are bound by it. The loss of the property to them of the succession of Irene Boyce can not affect plaintiff's rights. It was a clear transfer of her interests in and to that succession, which the plaintiff had the right to sell and the defendants to purchase. If the property perished or was taken from them the loss was theirs. This was a risk which they took upon themselves. The judgment which compels them to perform the obligation which they assumed is correct. But there is error in the judgment which condemns Powhatan Clark. He was not a party to the contract, and his wife entered into it before he married her. He is not therefore responsible. There is also error in the judgment which makes his property responsible for his wife's obligation contracted before his marriage. The property claimed in his intervention is established to be his. The community which had existed between them had been dissolved. The personal property attached is his individual property, and should have been returned to him.

It is therefore ordered, adjudged and decreed that the judgment of the district court against Powhatan Clark and rejecting his intervention, be avoided, annulled and reversed, and that there be judgment in his favor ordering the property attached to be returned to him, and that in other respects it be affirmed, defendants to pay the costs.

No. 5138.

MARY ANN RILEY v. MR. and MRS. CONDRAN.

Plaintiff, alleging to be the heir of one Mrs. Brady, sues to be recognized as the owner of one-half of a certain lot of ground, and for the payment of the rent thereof at the rate of fifty dollars per month from the first of February, 1867—which lot of ground belonged to the community existing between the deceased and her husband. After the death of Mrs. Brady the property, which was incumbered with a mortgage, was sold under executory process and bought by the defendant at the sheriff's sale thereof. This defense is valid.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Bolden & Foley, W. B. Lancaster*, for plaintiff and appellant. *Timony*, for defendants and appellees.

MORGAN, J. Plaintiff sues to be recognized as the owner of the one-

26	294
48	725
28	294
114	389

Mary Ann Riley v. Mr. and Mrs. Condran.

half of a certain lot of ground, and the rent thereof at the rate of fifty dollars per month from the first February, 1867.

The lot in question belonged, as is alleged, to the community which existed between J. M. C. Brady and his wife, the latter of whom is dead; plaintiff claims as her heir. At the time of Mrs. Brady's death the property sued for was incumbered with a mortgage. After her death it was seized and sold under executory process, and the defendants, at the sheriff's sale thereof, became the purchasers. The title thus acquired is set up as a defense to this action. It must prevail. See *Randolph v. Chapman*, 21 An. 486.

Judgment affirmed.

No. 5090.

B. BURBANK v. J. O. PIERCE.

The defendant, having bound himself to give plaintiff within a certain time, a good and sufficient title to the sixteenth part of a lead mine, on the fulfillment of certain conditions by plaintiff, refused at the expiration of the delay to comply with his agreement. At the trial, the plaintiff offered in evidence the said agreement, which was rejected on the ground that it was not properly stamped, the court holding that the stamp necessary for the sale of real property should have been affixed instead of that for an agreement to sell. The court *a qua* erred. The document had on it the stamp required for such instruments.

Parol evidence to show that defendant had parted with his interest in said property, and that the stock company owning the same was insolvent, to the knowledge of the defendant, one of the stockholders thereof, was not improperly offered. Plaintiff was not seeking to establish his title to real estate, but to show defendant's inability to comply with the agreement to make a title. The evidence was not therefore subject to the rule requiring written proof of such title. It was certainly relevant so far as it tended to show plaintiff's compliance and defendant's non-compliance with their mutual obligations.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough J. Sparrow & Montgomery*, for plaintiff and appellant. *Montgomery & Delony*, for defendant and appellee.

HOWELL J. Plaintiff sues to annul a contract for the sale of one sixteenth of a certain lead mine and farm in Illinois. At the date of the agreement, which was reduced to writing, the plaintiff paid \$3500 in cash and gave two notes for \$3250 each, due at one and two years, upon the payment of which the defendant bound himself to give plaintiff "a good and sufficient title to the same." After the expiration of the delay, the plaintiff called on defendant to comply, but he declined. At the trial the plaintiff offered the written instrument, above referred to, and it was rejected on the ground that it was not properly stamped, the court holding that the stamp necessary for the sale of real property should have been affixed instead of that for an agreement to sell. We think the court erred. The document had on it the stamp required for such instruments. The stamp contended for by defendant was the one

Burbank v. Pierce.

required for the act of sale which he was called on to give and which he refused. The stamp on the instrument appears to be properly canceled. The depositions offered by plaintiff were ruled out as irrelevant and establishing title to real property by parol.

The evidence was offered to show that the defendant had parted with his interest in said property and that the stock company owning the same was insolvent, to the knowledge of the defendant, one of the stockholders, at the date of his agreement with plaintiff, and to prove the latter's compliance with his obligations. As plaintiff was not seeking to establish his title to real estate, but to show defendant's inability to comply with his agreement to make a title, the evidence was not subject to the rule requiring written proof of such title. It was certainly relevant so far as it tended to show plaintiff's compliance and defendant's non-compliance with their mutual obligations. With this evidence, which comes up in the record, the plaintiff has made out his case.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of plaintiff annulling the contract of twenty-sixth March, 1867, described in the petition, that defendant be condemned to pay plaintiff \$3500 with legal interest from said date and return to plaintiff the two notes given in pursuance of said contract and pay costs in both courts.

26 296
44 847

No. 5116.

CHARLES DE GRECK & Co. v. MURPHY & GAIRNS and HOMER, REX & TRACEY—LEWIS, NANSON & Co., Intervenor. APPLETON, NOYES & Co. v. MURPHY & GAIRNS and HOMER, REX & TRACEY—LEWIS, NANSON & Co., Intervenor. Consolidated.

The evidence in this case shows that the transfer, the legality of which is questioned, was not a sale, but a *giving in payment*; that, at the time, the transferrors were in insolvent circumstances, and that the transferees knew that fact. The transfer was evidently designed to give an unjust preference to the transferees.

The pretext that the plaintiffs were not injured by the transfer, because Homer, Rex & Tracey, the transferees, had a privilege on the property transferred, is untenable. There is no evidence in the record to establish a privilege in their favor, and there is testimony to show that they could not have had a privilege on a large portion of the property embraced in the act of transfer.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. W. T. Mellen, J. G. Leach, Lewis & Drake*, for Charles De Greck & Co., plaintiffs and appellees. *Aroni & Collier*, for Homer, Rex & Tracey, defendants and appellees. *Thomas P. Farrar* and *E. H. Farrar*, for intervenors and appellants.

LUDELING, C. J. On the fifth of October, 1866, Murphy & Gairns, commercial and agricultural partners, in the parish of Tensas, trans-

De Greck & Co. v. Murphy & Gairns and Homer, Rex & Tracey.

ferred by notarial act to Homer, Rex & Tracey, merchants of St. Louis, Missouri, all their property, consisting of the crops on the Argyle and Morris plantations, one hundred and six mules, four horses, fourteen yoke of oxen, nineteen head of cattle, sheep, hogs, wagons and farming implements on the places; a warehouse and lot in Waterproof, with all the goods and merchandise, books and other personal property belonging to them in Tensas parish, including the open accounts in favor of the vendors, amounting to upwards of \$9300.

The act declares that the consideration of the sale is that the said Homer, Rex & Tracey "have this day paid cash to Murphy & Gairns the sum of \$66,159 48," the receipt of which is acknowledged, and for the balance of the consideration Homer, Rex & Tracey assumed to pay certain freedmen working said plantations \$2312, subject to some credits, and to pay \$2502 70, balance due eleven freedmen on Home plantation for cotton purchased from them by Murphy & Gairns.

In January, 1867, plaintiffs instituted these suits, alleging in substance that the sale was not made for cash, as declared by the parties; that the obligors were at the time in insolvent circumstances; that this fact was well known to the obligees, and that the contract of sale was designed to give and it did give to the obligees, who were creditors of Murphy & Gairns, an advantage over plaintiffs and other creditors of the obligors.

Lewis, Nanson & Co., having a claim against Homer, Rex & Tracey, instituted an attachment suit against them in the same court, and caused writs of attachment and garnishment to be served on Julius Aroni and others who had been garnisheed in plaintiffs' suits. They afterwards intervened in these suits, claiming that they were entitled to the funds in the hands of Julius Aroni, the garnishee.

The district judge decided that the funds in the hands of Aroni, the garnishee, were part of the assets transferred by Murphy & Gairns to Homer, Rex & Tracey; that the transfer to them was fraudulent, and that the funds in the hands of the garnishee be paid to the plaintiffs.

The intervenors alone have appealed.

The evidence shows that the transfer was not a sale, but a giving in payment, and that at the time the transferrors were in insolvent circumstances, and that the transferees knew that fact. The transfer was evidently designed to give an unjust preference to the transferees. C. C. art. 2658. Article 1982 declares: "If the party with whom the debtor contracted be in fraud as well as the debtor, he shall not, on the annulling the contract, be entitled to a restitution of the price or consideration he may have paid, except so much as he shall prove has inured to the benefit of the creditors, by adding to the amount of property applicable to the payment of their debts; but if the consid-

De Greck & Co. v. Murphy & Cairns and Homer, Rex & Tracey.

eration be a sum due from such debtor to the party with whom he contracted, then the only restitution to be made is the placing the parties in the situation in which they were before the contract complained of was made."

The pretext that the plaintiffs were not injured by the transfer because Homer, Rex & Tracey, the transferees, had a privilege on the property transferred, is untenable. There is no evidence in the record to establish a privilege in their favor, and there is much testimony to show that they could not have had a privilege on a large portion of the property embraced in the act of transfer.

It is therefore ordered and adjudged that the judgment of the court *a qua* be affirmed with costs of appeal.

No. 3314.

ADAM H. CARRAWAY v. THE MERCHANTS' MUTUAL INSURANCE COMPANY.

The plaintiff sues defendant for the alleged loss of a stock of goods by fire. The only important question in the case is, whether the action is barred, because it was not brought within one year from the date of the loss. The fifteenth condition of the policy provides: "All claims under this policy are barred unless prosecuted within one year from the date of the loss. No claim for loss to bear interest before judicial demand."

The court finds nothing doubtful or ambiguous in this clause of the policy. It means what it says: "That all claims under the policy are barred unless prosecuted (that is sued on) within one year from the date of the loss."

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Semmes & Mott*, for plaintiff and appellant. *A. Voorhies*, for defendants and appellants.

WYLY, J. The plaintiff, alleging that his stock of goods in his store in Catahoula parish, insured by the defendant at \$4000, was wholly destroyed by fire on twenty-ninth October, 1868, sues the defendant for \$3500, the amount of the loss sustained by him by reason of said fire. The defense is that the preliminary proof was not furnished in conformity with a clause of the policy, and also the action is barred because it was not brought within one year from the date of the loss, as required by an express stipulation in the policy.

The court gave judgment in favor of the defendant, and the plaintiff appeals.

The important question is, is the action barred, because it was not brought within one year from the date of the loss. The fifteenth condition of the policy provides that: "All claims under this policy are barred, unless prosecuted within one year from the date of the loss. No claim for loss to bear interest before judicial demand."

The plaintiff contends that the meaning of the word "prosecuted" is doubtful, its general meaning being the continuance of efforts already

Carraway v. The Merchants' Mutual Insurance Company.

begun, and its technical meaning being the institution of a lawsuit; that this doubt should be construed in favor of plaintiff, because the restrictive clause was imposed by the defendant as a stipulation in its favor. He, therefore, interprets the fifteenth condition of the policy to mean that all claims are to be barred, unless the preliminary proof is made within one year from the date of the loss, or some effort is made to establish the claims. The plaintiff also insists that if the word "prosecuted" be held to mean sued on, that the year within which suits must be brought does not commence to run until the right to prosecute the claim arises, which is sixty days after the claim is proved and adjusted, according to an express provision of the policy; and that under this construction this action is not barred, because it was brought within one year from the time the preliminary proof was completed.

We are unable to agree with the learned counsel of the plaintiff in the construction which he places upon the fifteenth condition of the policy. In it we find nothing doubtful or ambiguous. We think it means what it says, that "all claims under this policy are barred, unless prosecuted (that is, sued on), within one year from the date of the loss. No claim for loss to bear interest before judicial demand."

It is therefore ordered that the judgment herein in favor of the defendant be affirmed with costs.

Rehearing refused.

No. 3597.

P. BRADLEY & Co. v. MRS. S. A. WOODRUFF and JOHN MCCREA.

Plaintiffs agreed to furnish defendants with the means and supplies required to make a crop. Defendants agreed to ship their crop to the plaintiffs. Defendants made their crop and sent a portion of it to New Orleans, within the jurisdiction of the court *a qua*, to another person than the plaintiff. Said portion of the crop, on which plaintiffs claimed the furnishers' privilege for supplies, was sequestered by them.

The Seventh District Court erred in entertaining jurisdiction, because the domicile of the defendants was in the parish of St. Bernard. The conservatory order of sequestration was improperly granted, and, at the trial, should have been set aside and the suit dismissed.

The court, having no jurisdiction of the persons of the defendants, had no authority to determine either the amount or character of the demand set up against them by the plaintiffs; it could not decide that defendants were indebted to plaintiffs in any specific sum, and that there was the furnisher of supplies privilege on the cotton sequestered.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Budd & Grover*, for plaintiffs and appellees. *Bentinck Egan*, for defendants and appellants.

WYLY, J. The defendants, who were sued for \$1772, balance of account for the years 1868 and 1869, set up by the plaintiffs as factors furnishing supplies, appeal from the judgment maintaining the seques-

Bradley & Co. v. Mrs. Woodruff and McCrea.

tration of twelve bales of their cotton, and recognizing the plaintiffs' lien as furnisher of supplies for the sum of \$1175 42. The defendants being residents of the parish of St. Bernard, the court maintained their exception of domicile and rejected the demand for a personal judgment against them.

As the Seventh District Court had no jurisdiction, because the domicile of the defendants was in the parish of St. Bernard, the conservatory order of sequestration was improperly granted, and at the trial it should have been set aside and the suit dismissed.

The court having no jurisdiction of the persons of the defendants, had no authority to determine either the amount or character of the demand set up against them by the plaintiffs; it could not decide that defendants were indebted to plaintiffs in any specific sum, and that there was the furnisher of supplies privilege on the cotton. Being without jurisdiction the court could make no order in the premises.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that this suit be dismissed at the costs of appellees in both courts.

MORGAN, J., *dissenting*. Plaintiffs are commission merchants residing in this city.

Defendant is a planter living in the parish of St. Bernard.

Plaintiffs agreed to furnish defendant with the means and supplies required to make a crop. Defendant agreed to ship his crop to the plaintiffs.

The furnisher of supplies has a privilege on the crop to secure the payment of his advances.

Defendant made his crop and sent a portion of it to a person other than the plaintiffs. Plaintiffs, claiming an indebtedness for supplies, and finding the property upon which their privilege rests within the jurisdiction of the Seventh District Court of this city, sequestered it. They are dismissed because the defendant resides in the parish of St. Bernard, and can not be sued in the parish of Orleans. The doctrine announced by the court, as I understand it, is that a sequestration is a mere accessory to a principal demand, and as no judicial demand can be made upon a party except at his domicile, no court, except the court of the domicile of the defendant can issue the writ. I can not assent to this proposition. I have not been able to find the law upon which it rests, and I know of no authority to support it. I have been referred to the cases of *Mallard v. Cooley*, and *Alter v. Pickett*. The first case, not reported, expressly passes over the question, and the second, 24 An. p. 513, does not, in my opinion, touch it. *Alter's case*

was this: Alter obtained a judgment against H. C. Cummings in the Third District Court for the parish of Orleans. He then, after issuing *fiery facias*, filed a petition propounding interrogatories to Mrs. Pickett under the act of 1839. These interrogatories were served upon her personally in this city. Additional interrogatories were served upon her at her domicile in the parish of Bossier. They were taken for confessed, and judgment was rendered against her. This judgment was recorded in the parish of Bossier, and suit was afterwards instituted against the third possessor of property which was alleged to be subject to this judicial mortgage. The decision was that the judgment against Mrs. Pickett was an absolute nullity, because it was obtained against her in the parish of Orleans while her domicile was in the parish of Bossier.

Granted that this decision is correct, I do not see in what it resembles the one now under consideration. No question of privilege was before the court, nor was any property sought to be sequestered therein.

Debts due for necessary supplies furnished to any farm or plantation, not including articles furnished and which were sold to laborers, and debts due for money actually advanced and used for the purchase of necessary supplies, and the payment of necessary expenses for any farm or plantation on the crop of the year and the proceeds thereof, are privileged debts for which the crop stands responsible. C. C. 3217.

“The plaintiff may obtain a sequestration in all cases where he has a lien or privilege on property, upon complying with the requisites of the law.” C. P. 275. It is the crop which in reality owes the debt for the advances and supplies which alone enabled it to be raised, and on that crop the privilege exists, and this privilege can, I think, be asserted wherever the crop or its proceeds, is found. And this in the very nature of things. A planter, for instance, lives in the parish of Claiborne. He agrees with a merchant in New Orleans that in consideration of the merchant's furnishing him with the supplies necessary to carry on his plantation he will send him his crop, the proceeds whereof are first to be applied to the payment of these advances. The merchant complies with his contract. The crop is made and gathered. It is sent to New Orleans, but not to the merchant who has a privilege upon it. He learns that it is here. Under the decision just pronounced, to obtain a sequestration, by which alone his rights can be established, he must send to the parish of Claiborne, obtain an order of sequestration from the court there upon property not within its jurisdiction, and cause the same to be executed here. Any one can see that, in such a case, when the writ arrives the crop may be in mid ocean. This, it seems to me, is only pointing out a road which those

who wish to act dishonestly may follow with perfect success. I am opposed to it.

I think the law means what it says, and that when one has a privilege accorded to him upon a certain property, he may exercise that privilege in whosoever hands the property may be found, and wherever it may be found, regardless of the question of domicile.

I therefore dissent.

No. 4939.

MARY A. DOCKHAM, Wife, etc., v. CITY OF NEW ORLEANS. JOTHAM POTTER, Subrogee.

28	302
52	1260
28	302
116	653

In September, 1872, Potter, subrogee of the judgment styled *Josephine Lacoste v. Mary Ann Nugent*, who is represented as being no other person than Mary Ann Dockham, issued execution and seized under garnishment process the judgment of the plaintiff, Mary Ann Dockham v. The City of New Orleans. Before the garnishment proceeding was tried, to wit, in November, 1873, Mrs. Jane O'Rourke, subrogated to the judgment of the plaintiff against the city, filed a rule for the parties in interest to show cause why the amount of said judgment should not be paid to her.

It is evident that Potter has a right to the judgment in controversy, which is superior to that of the plaintiff in rule, because the seizure under garnishment proceeding was made before the city was notified of the transfer of the judgment to Mrs. O'Rourke, plaintiff in rule. Until this notice was given to the judgment debtor, the transferee was not possessed of the judgment, so far as Potter, a third person, was concerned.

To the objection that the judgment in the case of *Josephine Lacoste v. Mary Ann Nugent* was a nullity, because the agent who confessed judgment was unauthorized to do so, the answer is, that the judgment was consented to by an attorney at law in behalf of Mary Ann Nugent, and his authority was not denied under oath.

It is further objected that the seizure lapsed because the sheriff detained in his hands beyond the seventy days the *feri facias* upon which the garnishment process issued. This court finds that the writ was returned and a copy issued by the clerk upon which the seizure continued, in strict compliance with the law. Besides, an irregularity of this kind on the part of the sheriff would not release the seizure nor destroy the lien acquired thereby.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Kennard, Howe & Prentiss*, for Potter, appellant. *G. Schmidt*, for O'Rourke, appellee.

WYLY, J. In February, 1869, the plaintiff recovered judgment against the defendant for \$1000, and on appeal said judgment was affirmed by this court in November, 1872.

In September, 1872, J. Potter, subrogee of the judgment styled *Josephine Lacoste v. Mary Ann Nugent*, issued execution and seized under garnishment process the judgment of the plaintiff against the city of New Orleans.

In answer to the second interrogatory, the Mayor stated that "Mary A. Nugent, wife of Dockham, has a judgment against the city of New Orleans for one thousand dollars, which judgment is now on suspensive appeal to the Supreme Court of the State of Louisiana."

Mary A. Dockham v. City of New Orleans.

Before this garnishment proceeding was tried, to wit, in November, 1873, Mrs. Jane O'Rourke, subrogated to the judgment of the plaintiff against the defendant, filed the following rule: "On motion of G. Schmidt, attorney of Mrs. Jane O'Rourke, subrogated to the claim of plaintiff, and of John R. O'Rourke, her husband, who joins in this motion for the purpose of assisting his wife, ordered that the city of New Orleans, Henry C. Miller, Esq., and Jotham Potter, subrogated to the claim of Josephine Lacoste, show cause on Thursday, the tenth November, instant, why the city should not pay the amount of the judgment obtained against it in the above suit, say \$1000, with five per cent. interest from twenty-seventh October, 1868, and costs."

The court made the rule absolute, requiring the city to pay over to plaintiff in rule the amount of said judgment, less \$125 seized by Henry C. Miller in suit No. 3444.

From this judgment Jotham Potter, subrogated to judgment of Lacoste against Mary Ann Nugent, has appealed.

There is no controversy in this court in regard to that part of the judgment in favor of Miller. The contest is between the plaintiff in rule and the appellant.

It is evident that the appellant has a right to the judgment in controversy superior to the plaintiff in rule, because the seizure under garnishment proceeding was made before the city was notified of the transfer of the judgment to Mrs. O'Rourke, plaintiff in rule.

Until this notice was given to the judgment debtor, the transferee, Mrs. O'Rourke, was not possessed of the judgment so far as appellant, a third person, was concerned. Revised Code 2613, 2644.

The plaintiff in rule, however, contends that the judgment of the appellant is an absolute nullity, because the agent who confessed judgment in that case, to wit, the case of Lacoste v. Mary Ann Nugent, was unauthorized to confess judgment for her.

The answer to this is, the judgment was consented to by an attorney at law in behalf of Mary Ann Nugent, and his authority has not been denied under oath. *Dangerfield v. Thruston*, 8 N. S. 232. It is also objected that the seizure lapsed because the sheriff detained in his hands beyond the seventy days, the *fieri facias*, upon which the garnishment process issued. We find that the writ was returned and a copy issued by the clerk upon which the seizure continued, in strict compliance with the law. Besides, an irregularity of this kind on the part of the sheriff, would not release the seizure nor destroy the lien acquired thereby. Revised Statutes, sections 3415, 3416.

It is further objected that the plaintiff is not a judgment creditor of Mrs. Mary A. Dockham and therefore had no right to seize her judgment against the city of New Orleans; that Mary Ann Nugent, against

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whom he has judgment, is not the same person as Mrs. Mary A. Dockham.

This defense was not pleaded by plaintiff in rule. It seems to have been set up in this court for the first time. It is true there is not positive proof of the marriage of Mary Ann Nugent to John M. Dockham, as there probably would have been, had the question been raised in the court below; but still we think we are justified from the evidence to conclude that Mary Ann Nugent and Mrs. Mary A. Dockham is the same person. We find in the evidence that Mary Ann Nugent is the daughter of P. S. Nugent, and that Mrs. Mary A. Dockham is the daughter of P. S. Nugent.

In answer to the second interrogatory in the garnishment proceeding, the Mayor of New Orleans states that "Mary A. Nugent, wife of Dockham has obtained a judgment against the city, etc.;" and this was the reply to the interrogatory, "has Mary A. Nugent, wife of Dockham, obtained any judgment against the city, etc." We think the identity of the person is sufficiently established. There are other objections, but they are not of a serious character.

It is therefore ordered that the judgment herein in favor of plaintiff in rule be annulled, and it is now ordered that the city of New Orleans, garnishee herein, pay over to the appellant the amount of the judgment of Mary A. Dockham v. The City of New Orleans, less one hundred and twenty-five dollars, seized by H. C. Miller in suit No. 3444 on the docket of the Fifth District Court. It is further ordered that plaintiff in rule pay costs of both courts.

Rehearing refused.

No. 4769.

STATE OF LOUISIANA, ex rel. JOHN T. HAYES, v. THE CITY OF NEW ORLEANS.

The order of the court *a qua* dissolving the injunction in this case is one which, in the opinion of this court, might work an irreparable injury to the relator; therefore the relator had a right to appeal from it. The judge below erred in dissolving the injunction.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, for relator and appellant. *George S. Lacey*, City Attorney, for defendant and appellee.

TALIAFERRO, J. An injunction was obtained by the plaintiffs to restrain and prevent the city authorities from sending to the hospital of Dr. Anfoux indigent persons afflicted with the small-pox, to be taken care of and treated in that hospital at the public expense. The plaintiffs allege that by an act of the Legislature passed in the year

State of Louisiana ex rel. Hayes v. City of New Orleans.

1872, provision was made for the benefit of indigent persons afflicted with small-pox and other contagious disorders, by directing that such patients should be removed to the Luzenberg Hospital for treatment and attention at the expense of the city, and making it unlawful for any of the city authorities to infringe the provisions of the act and prescribing penalties for any violation of the law.

The answer is a general denial, and it alleges the unconstitutionality of the act of the Legislature relied upon by the plaintiffs; and upon a rule to show cause why the injunction should not be dissolved, as, upon bond given by the city, and after hearing the parties, the court so ordered.

From this order the plaintiffs have appealed.

The order dissolving the injunction is one which, in our opinion, might work an irreparable injury, and we therefore conclude the plaintiff had a right to appeal from it.

We think the court erred in dissolving the injunction.

It is therefore decreed that the order appealed from be annulled and set aside; that the injunction be reinstated, and that this case be remanded to the court of the first instance to be proceeded with according to law, the defendant and appellee paying the costs of appeal.

No. 3392.

CHARLES A. M. POUTZ v. AUGUSTE REGGIO.

A writ of attachment can be dissolved by exception as well as by rule to show cause. This course is pointed out in the 258th article of the Code of Practice which declares: "If the defendant, thus made a party to a suit, appear after having been served with the citation, or prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defense as in ordinary suits."

The exception in this case was in writing, and this is the notice required by law. Defendant might, under the practice which has grown up since the Code was adopted, have taken a rule to show cause, but there is no reason why he should not pursue the course pointed out by the written law, instead of that which convenience has made customary.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J. E. H. McCaleb and James Foulhouse*, for plaintiff and appellant. *Sambola & Ducros*, for defendant and appellee.

MORGAN J. Plaintiff instituted suit against the defendant, and upon his allegation that the defendant was about to convert his property into money with intent to place it beyond the reach of his creditors, and that he had mortgaged his property and had caused the mortgage to be inscribed with intent to give an unfair preference to Edward Reggio, obtained a writ of attachment against his property.

Pontz v. Reggio.

To this proceeding, after bonding the property attached, the defendant excepted upon various grounds, among others, that no facts were stated in support of the affidavit for attachment, and that the affidavit is untrue.

The exception was maintained and the attachment set aside. Plaintiff has appealed.

In this court he says that the only question necessary to be decided is, "can a writ of attachment be dissolved by exception, or is a rule to show cause the proper mode of proceeding?"

We answer that defendant's cause is pointed out in the 258th article of the Code of Practice which declares "if the defendant, thus made a party to a suit appear, after having been served with the citation, or prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defense as in ordinary suits." The exception was in writing, and this is the notice required by law. He might, under the practice which has grown up since the Code was adopted, have taken a rule to show cause, but we see no reason why he should not pursue the course pointed out by the written law instead of that which convenience has made customary.

On the merits of the exception we think the judgment is sustained by the evidence.

Judgment affirmed.

No. 3289.

WILLIAM DREW v. ATTAKAPAS MAIL TRANSPORTATION COMPANY AND TUPPER.

The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. William Grant*, for plaintiff and appellee. *Breaux & Fenner*, for defendants and appellants.

TALIAFERRO, J. This suit was brought to recover \$748 damages suffered by the plaintiff, as he alleges, from a collision between the steamers Warren Bell and Mary Gray in the Bayou Teche, on the fourteenth of June, 1869, by which the Mary Gray was sunk. The plaintiff charges that this collision was caused by the gross carelessness of the master and officers of the Warren Bell.

The answer is a general denial.

Drew v. Attakapas Mail Transportation Company and Tupper.

The plaintiff had judgment and the defendant has appealed.

A bill of exceptions was taken on the part of the defendant to the admission of evidence to prove that, at the time of the accident, the plaintiff was in possession of the Mary Gray as charterer, on the ground that there being no allegation of possession on his part other than as owner, proof of possession as charterer could not be admitted for want of proper and sufficient averments to admit such testimony; the allegations of the plaintiff in his petition being that he was owner, he could not contradict them. We think the objection to the admission of the testimony should have been sustained. Having alleged that he was the owner of the boat, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner. There being then no evidence of interest to enable the plaintiff to prosecute a suit for damages, the plaintiff fails in his case.

It is therefore ordered that the judgment of the court *a qua* be annulled, and that this suit be dismissed as of nonsuit.

No. 3371.

JAMES B. TAYLOR et al. v. CHARLES LAUER et al.

The defendants invoke their title as purchasers by mesne conveyance from the succession of Elizabeth Clew through John F. Clew, who acquired the property from that succession under the last will and testament of Elizabeth Clew, duly approved, registered and executed by judgment of the Second District Court, and put into possession as universal legatee under that will, this action of the Second District Court of New Orleans being, as it seems, predicated upon the proof that the will of the decedent had been duly admitted to probate by a decree of the surrogate of the county of New York.

Rights acquired by third parties by virtue of a judgment which is rendered by a court of competent jurisdiction after fulfillment of all the legal forms and requisites, and which is final and executory, become, as a general rule, fixed and absolute, and can not be divested by a subsequent reversal of the judgment upon a devolutive appeal.

An exception to the above mentioned rule would be where fraud had been practiced in obtaining the final judgment and the party in interest was party to the fraud, or where the fraud is apparent upon the record and could have been detected by an inspection of it. No exception of this sort is pretended to exist against the rights claimed by the defendants.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Wallace & Handlin*, for plaintiffs and appellees. *O. Roselius & A. Philips*, for defendants and appellants.

TALIAFERRO, J. The plaintiffs sue as heirs at law of Elizabeth Clew, deceased, to recover a lot of ground in the city of New Orleans in possession of the defendants, who, in answer to the petition of the plaintiffs, allege that they are the legal owners of the property under regular and valid deeds of conveyance.

Taylor et al. v. Lauer et al.

Judgment was rendered in favor of plaintiffs, and the defendants have appealed.

Elizabeth Day, wife of John F. Clew, died in the city of New York on March 4, 1859, leaving property of considerable value in the city of New Orleans. During that month Asa F. Cochran, a resident of New Orleans, applied for the administration of her estate. Clew, the surviving husband, opposed this application of Cochran, representing that his wife had left a will constituting him her universal legatee. Afterwards, Cochran filed another petition setting forth that he represented, under power of attorney, the legal heirs of the deceased, and urged this as an additional reason why he should be appointed administrator, and alleged further that the last will and testament of Mrs. Clew, under which John F. Clew claimed to be universal legatee, was then in litigation in New York and its validity as a last will was being contested. Clew thereupon rejoined by another opposition denying that the plaintiffs were the heirs of his deceased wife, or that she died intestate. He affirmatively set up the will as being in due form under the laws of the State of New York; that the will had been presented to the surrogate of the county of New York for probate; that it was on file among the archives of his office and could not be withdrawn. With this amended opposition he filed a certified copy of the will. He prayed that upon due proof being made the will be admitted to probate, and prayed for a commission to take testimony in New York.

This took place in April, 1859. Some time subsequently, in January, 1861, Clew filed a supplemental petition in which he represented that since the filing of his original petition the last will of Mrs. Clew had been admitted to probate by the surrogate of the county of New York and filed a duly certified copy of the will and of its probate in the court of the surrogate, and prayed to be confirmed as executor and for an inventory. An order was rendered on the same day for the approval, registration and execution of the will and for the confirmation of the petitioner as executor. An inventory having been made, letters were issued to Clew upon his executing bond in the sum of twenty thousand dollars.

The war coming on, things remained in *statu quo* until the twenty-ninth March, 1866. Clew filed a petition praying to be relieved from the executorship, presented his final account and prayed to be put into possession of the succession as universal legatee. He was accordingly recognized as the universal legatee and put into possession of the property of the succession, among which was the property forming the subject of this litigation. He then sold (in April, 1866), the property in controversy to James G. Gernon who, failing to pay the credit portion of the price when it became due, was proceeded against and

Taylor et al. v. Laner et al.

judgment being obtained, execution issued and the property purchased by Gernon from Clew was seized and sold, the defendants in this suit becoming the purchasers in April, 1869. In May, 1870, Cochran, claiming to represent the heirs at law of Mrs. Clew, brought an action in the Second District Court to annul and set aside the judgment of that court recognizing John F. Clew as universal legatee of Elizabeth Clew, and putting him in possession of her estate, on the ground that it had been improvidently rendered, and showed that the decree of the surrogate of New York admitting the will to probate had been annulled by a judgment of the Supreme Court of the State of New York, which recognized the heirs represented by him as entitled to the estate, and declaring that Elizabeth Clew had died intestate.

This suit, instituted by Cochran to annul, was brought against P. B. Foulke, public administrator, representing the succession of John F. Clew who, pending these proceedings, had died. In June, 1870, a judgment was rendered by the Second District Court annulling the decree of March, 1866, putting John F. Clew in possession as universal legatee, and declaring that Elizabeth Clew died intestate. After this judgment was rendered and became executory, in July, 1870, the plaintiffs instituted the present suit against the defendants as third possessors of the lot of ground sold by John F. Clew to Gernon, and sold under execution and purchased by the defendants.

We think the judgment of the lower court erroneous. We are unable to find in the record any evidence that satisfies us that the defendants, in purchasing the property in question, had any knowledge of the contestation going on upon appeal in the Supreme Court of New York, and that the validity of the will of Mrs. Clew was still contingent when they purchased the property at sheriff's sale in April, 1869. They invoke their title as purchasers by mesne conveyance from the succession of Elizabeth Clew through John F. Clew, who acquired the property from that succession under the last will and testament of Elizabeth Clew, duly approved, registered and executed by a judgment of the Second District Court and put into possession as universal legatee under that will. This action of the Second District Court of New Orleans being, as it seems, predicated upon the proof that the will of the decedent had been duly admitted to probate by a decree of the surrogate of the county of New York.

Rights acquired by third parties by virtue of a judgment rendered by a court of competent jurisdiction after the fulfillment of all the legal forms and requisites, and which is final and executory, become as a general rule, fixed and absolute, and can not be divested by a subsequent reversal of the judgment upon a devolutive appeal. An exception to this rule would be where fraud had been practiced in ob-

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taining the final judgment and the party in interest was a party to the fraud, or where the fraud is apparent upon the record and could have been detected by an inspection of it. No exception of this sort is pretended to exist against the rights claimed by the defendants. 12 An. 346. 8 La. 424. 16 La. 433. 5 N. S. 214. 10 An. 275.

It is therefore ordered that the judgment of the district court be annulled and set aside. It is further ordered that there be judgment in favor of the defendants, quieting them in their title and possession of the property in controversy, the plaintiffs and appellees paying costs in both courts.

Rehearing refused.

26 310
44 1088

No. 3404.

MRS. WM. A. M. WINTER v. CITY OF NEW ORLEANS.

This suit can not be maintained under the provisions of Art. 509. C. C. and section 318. of the Revised Statutes, on which plaintiff relies in claiming the batture to which she alleges to be entitled, inasmuch as she is not a riparian proprietor and does not even own the soil situated on the edge of the water.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont J. O. F. Buck*, for plaintiff and appellant. *Geo. S. Lacey*, City Attorney, for defendant and appellee.

MORGAN J. On the seventh of July, 1848, plaintiff purchased a certain lot of ground "situated in the suburb Delord of this city, in square bounded by Front Levee, Suzette, New Levee and Gaiennie streets, measuring twenty-one feet, three inches and six lines front, on Front Levee street, by ninety feet in depth and front on Gaiennie street."

She brings the present action under the article 509 of the Code and section 318 of the Revised Statutes, alleging that she is a riparian proprietor and as such entitled to all the batture which has formed, or which may form in front of her property, excepting so much of it as may be necessary for public utility and use, and that batture sufficient to be made available by her has accumulated in front of her property. She prays for judgment decreeing her to be the owner of the batture formed in front of the property above described, between it and the Mississippi river to a width between parallel lines of twenty-one feet six inches and three lines, excepting so much thereof as shall be ascertained to be necessary for purposes of public utility, and that she be put in possession thereof.

The art. 509 C. C. declares that "the alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or

stream, and whether the same be navigable or not, who is bound to leave public that portion of the bank which is required by law for the public use." Section 318 of the Revised Statutes provides that "whenever the riparian owner of any property in the incorporated towns or cities in this State is entitled to the right of accretion, and batture has been formed in front of his land more than is necessary for public use, which the corporation withholds from him, he shall have the right to institute suit against the corporation for so much of the batture as may not be necessary for public use," etc.

The difficulty in the way of the plaintiff, under the article of the Code upon which she relies is, that she does not own the soil situated on the edge of the water, and her difficulty as regards the section of the Revised Statutes is, that she is not a riparian owner, and her last difficulty is, that inasmuch as she purchased property fronting on Front Levee, we can not alter her title so as to make it front to the river.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

No. 2827.

RICHARD FRANCIS v. WILLIAM LAVINE et als.

All the objections urged in this case as grounds for dismissing the appeal, except the last, were waived by failing to file the motion within three days after the return day.

As to the last objection referred to—which is that all the parties interested in the judgment have not been made parties to the appeal, it is untenable. There is in the record an order for an appeal granted on motion in open court, and the bond is executed in favor of the clerk. All the parties who have not appealed are appellees.

The defendants, except one, who has not appealed with the rest, pleaded certain exceptions and answered to the merits. The case was submitted to the judge on the merits, without his being previously required to dispose of the exceptions. The rule is that the exceptions are considered as abandoned in such a contingency.

This rule is not inapplicable because the defendants were not present at the trial. If they desired their exceptions passed upon by the court it was their duty to be present, to urge it, before the case was taken up on its merits.

The defendants object that a dispute among the owners relative to the employment and sale of a vessel belongs exclusively to the admiralty jurisdiction, and that the State courts are without jurisdiction. That is not the question involved in this case. It is whether the defendants shall pay damages for breach of the contract of partnership, and also whether there shall be a settlement of partnership.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J. E. H. McCaleb*, for plaintiff and appellee. *George L. Bright*, for defendants and appellants.

ON MOTION TO DISMISS.

LUDELING, C. J. A motion to dismiss the appeal has been made on the grounds, that the order for an appeal granted on motion in open court, has not been complied with; that the appeal bond is not in com-

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44	581
26	311
45	483
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52	66
26	311
104	649

Francis v. Lavine et al.

pliance with said order; that after granting an appeal and fixing the return day and the amount of the bond, the district judge had no jurisdiction over the case, and that he could not change the amount of the appeal bond; and that all the parties interested in the judgment have not been made parties to this appeal. All the objections urged as grounds for dismissing the appeal, except the last, were waived by failing to file the motion within three days after the return day, the twenty-fifth day of April, 1870. On that day the transcript was filed, and the motion to dismiss was filed on the thirtieth day of April, 1870. 12 La. 480; 2 An. 138; 3 An. 326; 4 An. 514; 6 An. 115; 11 An. 613.

The last objection is untenable. We find in the record an order for an appeal granted on motion in open court, and the bond is executed in favor of the clerk. We think all the parties who have not appealed are appellees.

It is therefore ordered that the motion to dismiss be overruled.

ON ITS MERITS.

WYLY, J. This case was before this court in April, 1869, and was remanded in order that the necessary parties might be properly cited. 21 An. 265. It is a suit for settlement of the partnership which existed between the plaintiff and defendants in the pilotage business, and also for damages for breach of the partnership contract by the defendants. The court gave judgment against the defendants in favor of the plaintiff for one thousand dollars, and also decreed that the pilot boat "Robert Bruce," the property of the partnership, be sold and the proceeds be equally divided between the partners, the plaintiff and defendants. From this judgment all the defendants, except Alfred J. Ruiz, have appealed.

The defendants, except Ruiz, pleaded certain exceptions and answered to the merits. The case was submitted to the judge on the merits, without his being previously required to dispose of the exceptions; and the rule is that the exceptions are considered as abandoned in such a contingency.

The defendants, however, insist that as they were not present at the trial, the rule stated is not applicable to them. If they desired their exceptions passed upon by the court, it was their duty to be present to urge it before the case was taken up on the merits. There is nothing in the record showing that the answer filed in behalf of Ruiz was unauthorized, nor has he made any objection to it in this court.

We consider that all the parties were before the court; and upon examining the evidence we find that it fully sustains the judgment of the court below.

Francis v. Lavine et al.

There is no force in the objection that the plaintiff introduced at the second trial the proof of witnesses taken at the first.

The defendants object that a dispute among the owners relative to the employment and sale of a vessel belongs exclusive to the admiralty jurisdiction and the State courts are without jurisdiction. That is not the question in this case. It is whether the defendants shall pay damages for breach of the contract of partnership, and also whether there shall be a settlement of the partnership.

There are other objections but they are purely technical and without weight.

Judgment affirmed.

Rehearing refused.

No. 3297.

JOSIAH B. RICHARDSON v. JAMES E. ZUNTZ.

26	313
123	642
1124	508

Mere words spoken, however much they may be calculated to excite and irritate, do not justify an assault and battery. The law, in deference to human infirmities, concedes something in favor of an accused party, where it is shown there was great provocation, and in civil actions such provocation may go in mitigation of damages, but never in justification of the unlawful act.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* Jury trial. *L. A. Sheldon and Henderson, Hornor & Benedict*, for plaintiff and appellant. *A. A. Atocha*, for defendant and appellee.

TALIAFERRO, J. The petition alleges that the defendant on the ninth of July, 1869, made an assault upon the plaintiff with great violence and struck and beat him upon the head, neck, arms and other parts of the body with a heavy cane or stick, causing great bodily injury and pain, rendering him incapable of pursuing his ordinary business occupation and causing him great expense for surgical aid and attention necessary from the disabled condition into which he was thrown by the injuries inflicted upon his person by the blows received from the defendant. For this alleged violence and consequent injuries, suffering, loss of time from his business affairs, and expense of medical and surgical aid, he prays judgment in damages against the defendant for \$25,000.

The answer is a general denial.

The case was twice tried in the court below, and each time before a jury. Each trial resulted in a verdict of the jury in favor of the defendant.

The plaintiff prosecuted this appeal.

From the evidence we deduce the following state of facts: On the day of the occurrence of this assault the defendant took from the

banking house of Samuel Smith, at the corner of Camp and Common streets, a heavy cane containing a dangerous weapon, and started with it along Common street down towards St. Charles street, in the direction of the office or place of business of the plaintiff. A friend of the defendant knowing his purpose followed him, fearing bad consequences might result if a rencontre ensued while the defendant held this dangerous weapon, and overtaking him before he reached the plaintiff's room on St. Charles street, took the weapon from him, and gave him in place of it a stick or cane about three-quarters of an inch in diameter. With this cane he walked into the house where the plaintiff had a room in the second story and awaited the coming down stairs of the plaintiff. The defendant himself says in his own testimony that he went up stairs after the plaintiff, and the plaintiff hid himself. At the foot of the stairs when the plaintiff came down the defendant made the attack, striking the plaintiff several violent blows about the head and shoulders, as well as on the other parts of his body. The plaintiff had no weapons of any sort, and made no resistance other than throwing up his arms to ward off the blows. He succeeded in getting out upon the banquette and ran in the direction of Canal street. The defendant pursued, and at a short distance beyond the Southern Bank they were seen struggling for possession of the cane, the plaintiff having seized one end of it. At this juncture the defendant drew a pistol and threatened to shoot the plaintiff if he did not let go the cane. The latter thereupon let go his hold on the cane, and as the former was about to strike the plaintiff, two of the witnesses on the spot cried out, "that's enough," and the affair ended. The plaintiff was severely but not dangerously hurt. He bled profusely from the blows inflicted, was removed to his boarding house, and was under the care of a surgeon for about ten days, five of which he was confined to his room.

That the verdicts rendered by the juries in this case are clearly unwarranted by the evidence there can be no doubt. The judge *a quo* so believed, for in his refusal to grant a new trial after the second verdict was rendered, he said: "Being of opinion that the verdict in this case is erroneous, but the ends of justice requiring the motion to be overruled, this case having been twice tried by different juries with the same result, it is ordered that the rule be dismissed."

Here is a case in which a party, no doubt believing himself to have been traduced by another, and was greatly provoked and incensed against him, states himself that "for the threats he made I intended to chastise him, and I did chastise him. I did it for perjury also. He perjured himself and published lies and tried to levy blackmail." To inflict punishment with his own hands upon the plaintiff was a deter-

mination of the defendant deliberately formed and deliberately executed. In doing this he violated law, because he is not permitted to be his own avenger. The law gives redress for injuries such as the defendant complained of against the plaintiff, and he was at liberty to invoke the law for redress. He could legally resort to no other means to have the offender punished, and if he did, he became himself a transgressor of the law. It is plain to see the evil consequences that would result from permitting every man to judge of the kind and quantum of punishment that should be inflicted upon those whom he might accuse of having done him wrong. It is one of the great underlying principles of organized society that each of its members waives any natural right he might have had to be the judge of his own grievances and to be the vindicator of his own wrongs, by conceding that right to the State, a power wiser than himself, to determine the character of the injuries he may have to complain of, and abler than himself to vindicate his wrongs. This principle, founded in reason and philosophy, equalizes the strong man with the feeble one, and is intended to afford protection alike to every one in his person and property, to insure peace and order in the community, and to promote justice among men by securing every one in his rights, and punishing offenders by the infliction of penalties proportionate to their offenses. Outrage, wild disorder and crime would become dominant in the land if every man were left free to be his own judge and executioner. A bad man influenced by malice might beat, wound and ill treat his neighbor upon an accusation utterly false. A good man might do the same thing from the mistaken belief of having sustained an injury that in point of fact was wholly imaginary. Deplorable indeed would be such a state of things, and to avoid it society was organized and laws established.

Mere words spoken, however much they may be calculated to excite and irritate, do not justify an assault and battery. The law, in deference to human infirmities, concedes something in favor of an accused party, where it is shown there was great provocation, and in civil actions such provocation may go in mitigation of damages, but never in justification of the unlawful act.

In the case before us some proof was adduced that the plaintiff had endeavored, a short time before the attack was made upon him, to procure a pistol for the purpose of attacking the defendant; but it is plain from all the evidence that he drew no pistol on the occasion, and it is not pretended that he had one on his person during the time the defendant was beating him. It seems from the testimony that he did not assume the attitude of a combatant, but that his purpose was to escape from the defendant, and that he made no defense, other than by

Richardson v. Zuntz.

throwing up his arms to ward off the blows aimed at him, and by grabbing at his assailant and at the cane he was using to shield himself from the violence used by the defendant. From the blows received, the plaintiff, there is no doubt, suffered bodily pain to a considerable extent, although no permanent injury resulted. It is also apparent that he suffered pecuniarily as well as from the sense of degradation which such an infliction, whether justly or not, seems to imply. All this proceeded from the unlawful act of the defendant. We think \$500 damages should be awarded the plaintiff.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendant \$500 as damages, and that the defendant pay costs in both courts.

WYLY, J., *dissenting*. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Revised Code, article 2315. Under this law the plaintiff sues for the damages which he alleges he sustained by reason of the assault and battery which the defendant inflicted on him. It is probable from the beating which he received that the plaintiff suffered some damages, but the quantum thereof is not proved by any positive evidence. I do not think he ought to recover judgment against the defendant, requiring him to repair a damage, the amount of which is not proved.

It is urged, however, that a wholesome regard for the principles lying at the foundation of civil government requires us to impose vindictive damages in a case like this, where the defendant took the law into his own hands and sought to avenge what he considered his own wrongs.

To repress offenses of the kind at bar there are two remedies; one a criminal prosecution to vindicate public justice, and the other a civil action for the reparation of the damages suffered by the party upon whom the injury or public wrong was inflicted.

Whether the defendant has suffered the penalties for breaking the law in a criminal prosecution, does not appear. In my opinion vindictive damages are only penalties for violating the law, and they ought not to be imposed in this case, because criminal punishment can not be inflicted in a civil action. This question was elaborately discussed in the case of *Black v. Carrollton Railroad*, 10 An. 37, and the dissenting opinion of Chief Justice Slidell I regard as the true exposition of the law. I will not pursue the argument, however, because I believe the reasoning and authorities cited by Chief Justice Slidell are conclusive of the question.

Richardson v. Zantz.

But the main objection I have to the conclusion of my associates in this case is, they impose a penalty of \$500 on the defendant after the case has been twice submitted to a jury, and each time their verdict has been in favor of the defendant. Twenty-four jurors of the vicinage have considered the question of damages submitted to them in this litigation, and they have unanimously agreed that the plaintiff has no cause of complaint. Besides, on examining the evidence, I find no proof as to the amount of damages sustained by the plaintiff.

I maintain, therefore, that the finding of the jury is not manifestly erroneous, and that their verdict ought not to be disturbed.

"The jury are the legitimate judges of the quantum of damages, in assessing which the law leaves them much discretion. Their verdict will be generally sustained, unless excessive or unsupported by the evidence, when the case will be remanded." See authorities collated in Hennen's Digest, page 1061, section 2.

If the defendant has damaged the plaintiff, he has the right to have the amount thereof assessed by a jury, and if their finding is not supported by the evidence the case should be remanded. I have not lost all confidence in the juries of the country, and I believe if the plaintiff can not satisfy a jury that he has been injured, he should have no relief.

I therefore dissent in this case.

Rehearing refused.

No. 3396.

I. THARP v. O. V. WAGGNER.

The motion to dismiss the appeal on the ground that the bond is not made payable "to the clerk of the court," can not prevail.

The bond is given in favor of H. L. Burns, his executors and administrators and assigns. The certificate to the transcript shows that H. L. Burns is the clerk of the court, besides other evidence thereof in the record.

Without any evidence this court will take notice of the official capacity of H. L. Burns as a public officer of this State, and will presume that a judicial bond given in his favor was given in reference to that capacity and in reference to the statute requiring the bond to be given in favor of the clerk of the court.

There is no doubt that the bond could be enforced against its makers, having been given in reference to the law, and this is the proper test of its sufficiency.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Hawkins & Tharp*, for plaintiff and appellant. *Fellows & Mills*, for defendant and appellee.

ON MOTION TO DISMISS.

WYLY, J. The motion to dismiss this appeal on the ground that the appeal bond is not made payable "to the clerk of the court," can not

26	317
42	715

Tharp v. Wagner.

prevail. The bond is given in favor of "H. L. Burns, his executors and administrators and assigns." The certificate to the transcript shows that H. L. Burns is the clerk of the court, besides other evidence thereof in the record.

Without any evidence this court will take notice of the official capacity of H. L. Burns as a public officer of this State, and will presume that a judicial bond given in his favor was given in reference to that capacity and in reference to the statute requiring the bond to be given in favor of the clerk of the court. We think there is no doubt that the bond could be enforced against its makers, having been given in reference to the law, and this is the proper test of its sufficiency.

The motion is overruled.

ON THE MERITS.

HOWELL, J. This is a suit against the maker of a promissory note, the defense to which is that the said note, and another due at a later date, were given by defendant to the payee, W. H. Hannon, for the interest of the latter in a brickyard, the payment of said notes being secured by a mortgage on a certain brig, named Fredonia, which was by special agreement sold in New York, on condition that Hannon should accept half the price thereof in full satisfaction of the said two notes, which agreement was carried out and the notes thereby extinguished, and the plaintiff, not acquiring the one sued on prior to its maturity, can not recover.

Hannon was examined as a witness under a commission, and he states positively that the net proceeds of the vessel paid only one of the notes, which he returned to the defendant, but the other was not paid, and was not in his possession at the date of its maturity. The other evidence in the record does not overcome this positive testimony. The defendant was a witness in this case, and he does not contradict the statements of Hannon as to the accounts against and sale of the brig, the disposal of the proceeds and return of the one note, with a report of all these matters to him by Hannon. There was therefore an acquiescence on his part. As the evidence does not make out the defense, the plaintiff should recover.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of defendant \$2750, with five per cent. interest thereon from April 10, 1869, and costs.

Rehearing refused.

Succession of Simonds.

No. 4953.

SUCCESSION OF JOHN SHELDON SIMONDS.

Seven suits were filed in the Sixth District Court, parish of Orleans, against W. C. Harrison. Judgment being given against him in every case, he took a suspensive appeal in all of them, furnishing his bond with J. S. Simonds as security. Subsequently, to save costs, it was agreed between the parties to the suits, that only one record should be made up and filed in the Supreme Court, and that its decision in that case should be the judgment in all the other cases.

It is impossible to see how or why the surety was, as contended, released by that agreement. The case which was decided was a test one; it was identical with the other cases not filed in the Supreme Court in virtue of the agreement aforesaid, which did not affect the suspensive appeal taken. It only dispensed with making more than one transcript, to avoid unnecessary costs.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Hornor & Benedict*, for plaintiffs and appellants. *B. Egan*, for defendant and appellee.

LUDELING, C. J. In 1866 seven suits were filed in the Sixth District Court of the parish of Orleans in favor of various insurance companies against W. C. Harrison. There were judgments in all the cases against the defendant, who took a suspensive appeal in all the cases, giving his bond according to law with John S. Simonds as security. Subsequently, to save costs, it was agreed between the parties to the suit, that only one record should be made up and filed in the Supreme Court, and that the decision of the Supreme Court in that case should be the judgment in all the other cases. It is pretended now, on behalf of John S. Simonds' succession, that said agreement released the surety on the appeal bond. We are unable to see how or why the surety was released. The case which was decided was a test case; it was identical with other cases not filed in the Supreme Court in virtue of the agreement aforesaid, and the agreement did not affect the suspensive appeal taken—it only dispensed with making more than one transcript, to avoid unnecessary costs. The case of *Tournillon v. Ratcliffe*, 20 An. 179, is not like the case at bar.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgments in favor of the opponents, as follows:

18,014. Commercial Insurance Company, \$393 75. Six per cent. annual interest from twenty-ninth June, 1861. Clerk's costs, \$44 80; sheriff's costs, \$17 80.

18,015. Firemen's Insurance Company, \$525. Six per cent. annual interest from eighteenth May, 1861, less credit fourteenth May, 1872, of \$118 12. Clerk's costs, \$46 30; sheriff's costs, \$19 80.

18,016. Firemen's Insurance Company, \$393 75. Six per cent. annual interest from twenty-ninth June, 1861. Clerk's costs, \$45 95; sheriff's costs, \$17 80.

18,017. Western Insurance Company, \$393 75. Six per cent. interest per annum from twenty-ninth June, 1861. Clerk's costs, \$45 60; sheriff's costs \$19 80.

18,018. Western Insurance Company, \$525. Six per cent. yearly interest from eighteenth May, 1861, less credit fourteenth May, 1872, \$118 50. Clerk's costs, \$45 60; sheriff's costs, \$17 80.

Each of the above is also subject to a credit of \$1 60 on costs.

It is further ordered that the succession pay costs in both courts.

Rehearing refused.

No. 4991.

THOMAS BRADY v. PARISH OF ASCENSION.

In May, 1872, plaintiff instituted a suit against the parish of Ascension to compel the president of the police jury and the treasurer of the parish to satisfy his claim for damages in consequence of the destruction of his boat by a mob. The suit was based upon resolutions of the police jury passed in 1871, authorizing the settlement of said claim by giving to plaintiff the bonds of the parish for \$7585, but which resolutions were subsequently repealed. There was judgment against plaintiff who appealed. This appeal, however, was subsequently abandoned.

In May, 1873, the present suit was instituted. The demand is to enforce what the plaintiff calls a compromise offered by the parish in the resolutions of 1871, before mentioned. The defense is the plea of *res judicata*.

The only difference between the suit before the court and the one decided in May 1872, is that the plaintiff now asks for a judgment for \$7585 in *dollars*, whereas before he asked for the *bonds* of the parish for that amount. The plea of *res judicata* must prevail.

It matters not in what form the question may have been presented, if the same question once judicially decided between the same parties be again agitated, it must be regarded as the thing adjudged.

It is certain that, had the plaintiff succeeded in the former suit, he could not have instituted the present one.

Another test is, that the same evidence will support both actions.

There is no force in the objection that this court can not pass upon the exception of *res judicata*, because the court *a qua* did not. By agreement the exception was referred to the merits, and the judge *a quo*, being of opinion that the defendant was entitled to a judgment on the merits, expressed no opinion as to the exception. But the whole case is before this court as it was before him. The court, therefore, is not precluded from deciding this question.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Flagg, J. S. P. Blanc, Finney & Boland*, for plaintiff and appellant. *Frederick Duffel*, District Attorney *pro tem.*, and *R. N. Simms*, for defendant and appellee.

LUDELING, C. J. The plaintiff had a trading boat which was destroyed in 1870 by a mob, while it was within the jurisdiction of the parish of Ascension.

On the third of January, 1871, he instituted a suit against the parish for \$12,678, to indemnify his losses.

In March, 1871, resolutions of the police jury, it is alleged, were adopted, authorizing the settlement of said claim of Thomas Brady by

giving him bonds of the parish for \$7585, payable in one and two years. Subsequently the police jury passed an ordinance repealing said resolutions. In May, 1872, Brady instituted suit to compel the president of the police jury and the treasurer of the parish to issue and deliver to him the bonds of the parish to satisfy his claim, under the aforesaid resolutions.

The defense to that suit was the nullity of said resolutions, because the police jury had not adopted them by the requisite vote, and for other reasons not now necessary to be enumerated. There was judgment in favor of the defendant and against the plaintiff, dismissing his demand with costs. An appeal was granted on motion, returnable in January, 1873, but that appeal seems to have been abandoned.

On the twelfth of May, 1873, the present suit was instituted. The demand in this suit is to enforce what the plaintiff calls a compromise, offered by the parish in the resolutions of March, 1871, before mentioned. The only difference between the suit before the court and the one decided in May, 1872, is that the plaintiff now asks for a judgment for \$7585, in dollars, whereas before he asked for the bonds of the parish for that amount.

The plea of *res judicata*, filed by the defendant, should have been maintained.

It matters not in what form the question may have been presented, if the same question, once judicially decided between the same parties be again agitated, it must be regarded as the thing adjudged. 19 La. 328; 12 An. 197; 14 An. 799.

It is quite certain that if the judgment had been in favor of the plaintiff, the defendant could never afterwards have contested the validity of the resolutions which form the basis of the demands of the plaintiff in both suits. It is equally certain that had the plaintiff succeeded in the former suit, he could not have instituted this suit.

Still another test is, that the same evidence will support both actions—the cause of action is, therefore, the same in the two cases. Starkie, Evidence, part 2 p. 64.

It is insisted, however, that this court can not pass upon the exception of *res judicata*, because the court *a quo* did not.

By agreement the exception was referred to the merits, and the judge *a quo*, being of opinion that the defendant was entitled to a judgment on the merits, expressed no opinion as to the exception. That does not preclude us from deciding the question. The whole case is before us, as it was before him.

For the reason aforesaid, it is ordered that the judgment of the lower court be affirmed, with costs of appeal.

Rehearing refused.

State ex rel. Romaine v. West, Administrator of Improvements, and City of New Orleans.

No. 4903.

STATE ex rel. ROMAINE v. J. R. WEST, Administrator of Public Improvements and CITY OF NEW ORLEANS.

The writ of mandamus, it has been settled, may issue to compel a public officer to perform a mere ministerial duty; but it must clearly appear that the duty is one which from its character leaves no discretion in the officer to do or not to do.

Here it does not clearly appear from the record that it is absolutely the duty of the respondent to do the things required of him. He avers that the contract asserted by the relator is null and void, and he annexes his affidavit of the truth of his averments. It is not his duty to execute an illegal and void contract, knowing it to be such.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. John Ray*, for appellant. *George S. Lacey*, for defendant and appellee.

TALIAFERRO, J. The relator prays that a mandamus issue against the defendant, West, commanding him to furnish the relator with the necessary grades, lines and levels to enable him to proceed under his contract with the City of Jefferson, entered into on the seventh of March, 1870, for shelling certain streets of that city. He predicates this proceeding against the Administrator of Public Improvements of New Orleans upon the ninth section of an act of the Legislature, approved March 16, 1870, entitled "An act to extend the limits of the parish of Orleans," etc., by which the City of Jefferson was incorporated with and became a part of New Orleans; that the Administrator of Public Improvements of the city last named having general supervision and control over the streets, sidewalks, etc., is the proper person to furnish the relator with the necessary grades, levels, lines, etc., to enable him to go on to complete the shelling of certain streets, according to the aforesaid contract made by him with the City of Jefferson a short time before the passage of the act of the Legislature just recited.

The respondent alleges for cause why the mandamus should not be granted, that there exists no valid contract binding the City of Jefferson towards the relator to have the work done which he alleges he contracted to perform. The respondent avers that the pretended contract alleged by the relator is null and void and without effect against the city of New Orleans.

The rule was discharged and relator appeals.

We think the decision correct. The writ of mandamus, it has been settled, may issue to compel a public officer to perform a mere ministerial duty; but it must clearly appear that the duty is one which from its character leaves no discretion in the officer to do or not to do. Here it does not clearly appear from the record that it is absolutely the duty of the respondent to do the things required of him. He avers

State ex rel. Romaine v. West, Administrator of Improvements, and City of New Orleans.

that the contract asserted by the relator is null and void, and he annexes his affidavit of the truth of his averments. Was it his duty to execute an illegal and void contract, knowing it to be such? The contract alleged by the relator to have been entered into between himself and the City of Jefferson is one which he looked to the city of New Orleans to fulfill. But the inference is fair that the city of New Orleans repudiated this contract. We can see no right the relator has, under the circumstances, to require the Administrator of Public Improvements to do the acts preliminary to the prosecution of a work which the city refuses to have executed.

It is therefore ordered that the decree of the lower court be affirmed with costs.

No. 4800.

LOUISE DROUET v. SUCCESSION OF L. F. DROUET.

The administrator of a succession only represents the creditors, and after the settlement of the debts, must turn over the estate to the heirs; but can not create or recognize any debt which will pass with the estate, and remain a binding, continuing debt against the heirs, because he is not appointed to represent them.

The provisions of the law seem to give to an illegitimate child the right of action for alimony only against the parent or his heirs. It is not a debt against the succession, which the creditors must allow, or which they have an interest in resisting, but a personal debt of the parent and of those who inherit his estate, and the heirs only take the residuum after the payment of the debts of the succession.

Therefore, the action for alimony, on the part of an illegitimate child, can not properly be brought against the administrator of a succession. It seems by law to be owing by the heirs according to their virile share, and the obligation to pay it continues while it is necessary, or they are able to pay.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. O. M. Conrad & Son*, for plaintiff and appellee. *E. Filleul and O. Drouet*, for defendant and appellant.

HOWELL, J. This is a suit against the administrator to be declared the illegitimate child of the deceased and to recover alimony at fifty dollars per month, to be paid out of the property of the succession.

The administrator excepted that plaintiff has no right of action against him, as he does not represent the heirs.

Article 241 R. C. C. declares that, "illegitimate children have a right to claim this alimony, not only from their father and mother, but from their heirs after their death."

Article 919 provides, in the first clause, that natural children are called to the succession of their natural father, who has duly acknowledged them, to the exclusion only of the State, and says, in the second clause, "In all other cases, they can only bring an action against their natural father or his heirs for alimony, the amount of which shall be determined, as is directed in the title of father and child."

Louise Drouet v. Succession of Drouet.

Those provisions of the law seem to give the right of action for alimony only against the parent or his heirs; and this seems reasonable, as the payment of alimony may be necessarily required for a considerable time, and to be made only by the parties against whom the law creates the claim. It does not seem to be a debt against the succession, which the creditors must allow, or which they have an interest in resisting, but a personal debt of the parent and those who inherit his estate, and the heirs only take the residuum after the payment of the debts of the succession.

The administrator only represents the creditors, and after the settlement of the debts, he must turn over the estate to the heirs; but he can not create or recognize any debt which will pass with the estate and remain a binding, continuing debt against the heirs, because he is not appointed to represent them.

We think, therefore, the action for alimony can not properly be brought against the administrator. It seems by law to be owing by the heirs according to their virile share, and the obligation to pay it continues while it is necessary, or they are able to pay.

It is therefore ordered that the judgment appealed from be reversed, and that the plaintiff's demand be dismissed without prejudice to her right of action against proper parties. Costs to be paid by appellee.

Rehearing refused.

No. 4017.

MRS. M. H. WALKER, wife, etc., v. F. LIMONGY, et al.

The wife can, with the consent of her husband, sell her separate property and give the proceeds to her husband, who then becomes her debtor. Having the authority to sell and having made a sale in due form, the object for which it was made by the wife, to raise money for her husband, does not make it any the less a sale as to third persons without knowledge. The public knows that a wife has the right to sell her property if duly authorized, and that her husband may receive and use the proceeds, and if there is nothing to create suspicion, or put the capitalist on his guard, he may safely discount a mortgage note given by a purchaser to a married woman as a part of the price of her property regularly sold by her.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Semmes & Mott*, for plaintiff and appellant. *H. Michel, C. Roselius* and *A. Philips*, for defendants and appellees.

HOWELL, J. On the eighth of July, 1870, Mrs. M. H. Walker, authorized and assisted by her husband, A. W. Walker, appeared before T. Guyol, notary public, and executed an act of sale to J. S. Tully of two lots of ground and the improvements thereon, situated on St. Charles street, for the price of \$18,000, of which \$7000 were alleged to be in cash, and the purchaser assumed the balance of the mortgage,

Mrs. Walker v. Limongy et al.

then amounting to \$2720, due the Citizens' Bank, and gave his three notes for \$2666 66 $\frac{2}{3}$ each, with eight per cent. interest after maturity, payable at six, twelve and eighteen months, and secured by mortgage on the property sold. F. Limongy, as the holder of the first of said notes, after receiving payment of the interest at different periods and a part of the principal, issued executory process against Tully for the balance and caused the mortgaged property to be seized and advertised for sale; whereupon Mrs. Walker enjoined the sale on the grounds that the said sale to Tully was not real, but intended as a mortgage to raise money for the benefit of her husband, and asked that the said sale be declared null and the said notes given by Tully be declared inoperative as a mortgage upon her said property.

From a judgment dissolving her injunction with damages, she has appealed.

The act was read to Mrs. Walker when she signed it and she directed the notary to deliver the notes to her husband. No cash was paid, and some two or three weeks after the date of the act, Tully gave to A. W. Walker a counter letter, acknowledging that the said sale was merely an accommodation sale, made to give currency to the notes executed by him, that he paid no cash, that the sale was null, and obligated himself to transfer the property to Mrs. Walker when requested, subject however to the mortgage securing his notes. Of this letter, which has never been recorded, Mrs. Walker had no knowledge until the property was seized, and then she found it among her husband's papers, after he had suddenly disappeared. Knowledge of the transaction was not brought home to Limongy, who discounted the note in the hands of the notary, the proceeds of which went to A. W. Walker. It is clear that the transaction was intended to raise money for the benefit of Walker, who expected to pay the notes and have the property retransferred to his wife.

The question is, can the innocent third holder of the note, so executed, enforce the mortgage by which its payment is secured?

The wife can, with the authorization of her husband, sell her separate property and give the proceeds to her husband, who then becomes her debtor. R. C. C. 2390. Having the authority to sell and having made a sale in due form, the object for which it was made by the wife, to wit, to raise money for her husband, does not make it any the less a sale as to third persons without knowledge. We are not prepared to say that, because, as between the parties, an act may be intended as an indirect way of issuing and giving currency to notes to be discounted for the benefit of the husband, the mortgage, executed in due form by an apparent purchaser to secure notes given by him for the alleged price, can be declared to be simply a mortgage executed by the

Mrs. Walker v: Limongy et al.

wife for the benefit of her husband. The public knows that a wife has the power to sell her property, if duly authorized, and that her husband may receive and use the proceeds, and if there is nothing to create suspicion or put the capitalist on his guard, he may safely discount a mortgage note given by a purchaser to a married woman as a part of the price of her property regularly sold by her.

Judgment affirmed.

Rehearing refused.

No. 4321.

SUCCESSION OF A. CONSTANT HEARING.

- A man may take out a policy of insurance on his life in the name of any one, or having taken it out in his own name, he may, with the consent of the assurers, transfer it to whom he pleases.
- A policy of insurance is not a piece of property; it is the evidence of a contract, the contract being that a certain sum of money will be paid upon the happening of a certain event, to a particular person, who is named in the policy, or who may be the legal holder thereof.
- A creditor may have the life of his debtor insured, even without the consent of his debtor. A husband has the right to insure his life in the interest of his wife and child, as well as in the interest of his creditor. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event secured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed. It is the wife whom the husband seeks to protect when he insures his life in her behalf. Otherwise he would not insure in her name. He has no need to protect his creditors by such a mode, for they can protect themselves.

A PPEAL from the Second District Court, parish of Orleans. *Tissot.*
J. George L. Bright, for plaintiffs and appellants. *Hudson & Fearn* and *J. L. Tissot*, for defendant and appellee.

MORGAN, J. This is an attempt on the part of several creditors of the deceased A. C. Hearing, to force his widow to place upon the inventory of the property of his estate several policies of insurance which had been effected on his life. The policies are issued in favor of his wife, and his wife and child, or have been transferred to them. One of the policies was on the life of another man, transferred by the assured to Hearing, and by him transferred to his wife.

Mrs. Hearing had obtained a separation of property from her husband, and a judgment against him for \$2500, with legal interest from twenty-seventh July, 1854. Upon this judgment *fieri facias* issued, and was returned *nulla bona*. Subsequently her counsel received from her husband \$475 50 by the sale and transfer to her of all the furniture and movables of the deceased in the house No. 21 Hospital street.

The premiums on the policies in controversy have been paid by

26	326
46	347
46	1222
26	326
47	901
26	326
48	760
26	326
50	1039
50	1040
26	326
109	365

Succession of Hearing.

Mrs. Hearing, or the policies were issued directly for her benefit and the benefit of her child.

Admitting that the judgment of separation is worthless, upon which we express no opinion, the question we are called upon to decide is whether these policies should be inventoried as a part of Hearing's estate, and thus made liable for his debts, or whether they belong to his wife and child?

We think the latter. A man may take out a policy of insurance on his life in the name of any one, or having taken it out in his own name, he may, with the consent of the assurers, transfer it to whom he pleases. A policy of insurance is not a piece of property; it is the evidence of a contract, the contract being that a certain sum of money will be paid upon the happening of a certain event, to a particular person named in the policy, or who may be the legal holder thereof. A creditor may have the life of his debtor insured, even without the consent of his debtor. A husband has the right, we think, to insure his life in the interest of his wife and child, as well as in the interest of his creditor, and his obligation to provide for them in case of his death is certainly well recognized. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event insured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed. It is the wife whom the husband seeks to protect when he insures his life in her behalf; otherwise he would not insure in her name. He has no need to protect his creditors by such a mode, for they can protect themselves.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

LUDELING, C. J., *dissenting*. Antoine Constant Hearing died at his domicile in New Orleans on the twenty-fifth of December, 1872. He left a will making his child his universal legatee and his wife his executrix. This suit is to compel her to put upon the inventory of the succession certain policies of insurance on his life, made during his marriage, in favor of his wife and child, and one on the life of a stranger which had been transferred to the husband, who had transferred it to his wife, amounting in the aggregate to upwards of \$19,000.

The question presented for decision is, do these policies belong to the succession?

In regard to the policies in favor of the wife and the one transferred

to her, I have no doubt they belong to the succession, having constituted a part of the community of acquets and gains existing between her and her husband at the time the policies were acquired.

The rights were acquired by Hearing, he paying the premiums. They belonged therefore to the community, although acquired in the name of the wife alone. The Civil Code declares that this "community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during marriage, either by donations made jointly to them both or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase." Article 2402.

It is urged that she acquires the insurance money only after the dissolution of the community by the death of her husband. But if she had not had the policies, which were created necessarily during the lifetime of the husband whose life was insured, no money could have been collected after death.

Insurance money was paid only in consequence of the contracts of assurance, and the right to the money stipulated to be paid therein was vested the moment the policies were delivered to the party insuring, subject only to the conditions stipulated in the policies. The right to the money existed during the marriage, although not exigible until after the death of the assured. The case of succession of Richardson, 14 An. p. 1, can not be regarded as an authority in point. The question decided in that case was that a husband who owed his wife for paraphernal funds received by him, could authorize her to invest the money paid by him to her to satisfy her claims against him for her paraphernal property in a policy of assurance on her life.

In the case of succession of Kugler, 23 An., the only question was whether or not the widow and children of Kugler could claim \$1000 of the succession, besides the insurance money. We held that the evidence showed they had \$1000 when the deceased died, and could not get any more under the homestead law. The question involved in the case at bar was not raised in that case, and could not have been, and I believe that it is now presented for decision to this court for the first time.

The French decisions referred to in the defendant's brief go to this extent and no further, that the assured, who obligates himself to pay the premium on the policy in favor of the persons named therein, stipulates not for himself, but for those named by him, and that under

 Succession of Hearing.

art. 1121 of the Code Napoleon, the parties thus named have acquired the right to the future insurance money from the date of the contract.

But those decisions do not decide that such *stipulation pour autrui* can be made by the husband in favor of his wife, so as to vest a separate and distinct right in herself. On the contrary, as it is held that the rights vested in the person in whose favor the stipulation is made, from the date of the contract, it follows that the right was acquired during the community, and must belong to the community, unless insurance policies form an exception to the general rule. I know of no such exception. And the laws of Louisiana forbid contracts between husbands and wives except in the few cases enumerated in the Code. The policy which was transferred to the husband, and which was afterwards transferred by him to his wife, clearly belongs to the community, as the husband was forbidden by the law to contract with his wife.

The pretended judgment of separation between the husband and wife has no validity. The claim of the wife was for her property received by the husband in Missouri when they resided there.

In regard to the policies in favor of the child, I have more difficulty in coming to a conclusion. I am inclined to the opinion, however, that Mr. Hearing could not make those *stipulations pour autrui*, as to his child or strangers, unless at the time he made the contracts of assurance his affairs were in such a condition that he could have made valid donations of his property to the value of the premiums paid. This does not appear to have been the case. The property of the debtor is the common pledge of his creditors, and he can not under the circumstances gratuitously dispose of it to their prejudice with the sanction of the law.

I therefore dissent from the opinion of the majority of the court.

Rehearing refused.

 No. 4967.

SUCCESSION OF ETIENNE CARLON.

As the law has prescribed no specific form in which the appointments of administrators are to be made, if the certificate of appointment is signed by the judge, although it may not be in the usual form and manner in which such appointments are made, and letters issued, yet it must be considered as the act of the judge and effect must be given to it.

In this case the instrument declares that the application was made, that the party applying was duly appointed administrator and has fulfilled all the requirements of the law. This is to all intents and purposes the evidence of an appointment by the judge who signed the document.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Albert Voorhies*, for appellant. *J. A. & V. J. Rozier*, for appellee.

HOWELL, J. The appellees, who are neither creditors nor heirs,

took a rule against A. E. Carlon to show cause why he should not desist from pretending that he has been appointed administrator of this succession and from acting as such, on the grounds that there is no order of court appointing him; that he has not furnished a bond as required by law, and that he has without authority assumed in such capacity to sue the movers.

No exception was taken to the right or form of action, and we are called on to determine whether the administrator has authority to act as administrator. He has produced the following instrument:

“ STATE OF LOUISIANA,

“ Second District Court, for the parish of Orleans.

“ This shall certify to whom it may concern, that on the seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-two, and the ninety-seventh of the Independence of the United States of America, an application was made to the honorable judge of the Second District Court, for the parish of Orleans, by Anacharsis Etienne Carlon, praying that he might be appointed administrator of the succession of Etienne Carlon, his deceased father. Now, know ye, that the said Anacharsis Etienne Carlon has been and is hereby appointed administrator to the said succession of Etienne Carlon, and that he has fulfilled all the requisites of the law.

“ Witness our hand and the seal of the said Second District Court, this fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety-seventh of the Independence of the United States.

(Signed)

“ A. L. TISSOT, Judge.

(Signed)

“ A. RICHARDS,

“ Deputy Clerk.”

The appellees insist that the clerk issued the above certificate without authority and in error, and erroneously made the judge sign it, and it is therefore meaningless. We find no evidence that the clerk caused the judge to sign it erroneously, and although it is not the usual manner in which such appointments are made and letters issued, yet we must consider it the act of the judge; and as the law has prescribed no specific form in which the appointments of administrators are to be made, we must give it the effect of an order appointing the appellant. The instrument declares that the application was made by the appellant, that he was and is hereby appointed administrator, and has fulfilled all the requirements of the law. This is to all intents and purposes the evidence of an appointment by the judge who signed the document. In the case in 6 An. p. 760, it does not appear that the judge signed the letters of administration, on which the party relied to show his appointment. It was merely the act of the clerk, who had

Succession of Carlon.

not the power to make the appointment; while here it is the act of the judge.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant, A. E. Carlon, dismissing the rule against him with costs in both courts.

Rehearing refused.

No. 5113.

JOHN J. CARRUTH v. CARTER & BROTHER.

The note sued upon in this case was deliberately given, and was secured by mortgage. No fraud is alleged. Whether usurious interest was included in it or not is immaterial under the laws of the State.

Besides, after several partial payments had been subsequently made, a settlement was had, and the defendants, again in writing, acknowledged themselves to be indebted to the plaintiff in the sum claimed.

A PPEAL from the Tenth Judicial District Court, parish of St. Helena. *Kemp, J. W. O. Pipkin* and *E. F. Russell*, for plaintiff and appellee. *T. & E. J. Ellis*, for defendants and appellants.

LUDELING, C. J. This is a suit to recover the balance due on a mortgage note. The defense is partial failure of consideration and usury. There was judgment in favor of the plaintiff and the defendants have appealed.

On the trial the defendants offered themselves and another witness to prove the usury and what they said was an error in the amount of the note. The testimony was objected to and the evidence was rejected, on the grounds that plaintiff was a third party who had acquired the note before maturity, and was not bound by prior equities.

The judge *a quo* erred in supposing the plaintiff a third party. But if the testimony were in the record, it would not change the opinion we entertain. The note was given deliberately, and was secured by a mortgage, and no fraud is alleged. Whether usurious interest was included in it or not is immaterial, under the laws of this State. Subsequently, after several partial payments had been made, a settlement was had, and the defendants, again, in writing, acknowledged themselves to be indebted to the plaintiff in the sum claimed.

It appears, however, that since that settlement, a further payment of \$400 was made on the twelfth of December, 1871, and the judge *a quo* erred in not allowing this credit.

It is therefore ordered and adjudged that the judgment of the lower court be amended by allowing a credit of four hundred dollars on the twelfth of December, 1871; that, as thus amended, the judgment be affirmed. Costs of appeal to be paid by the appellee.

Rehearing refused.

26	331
47	1286
26	331
104	41
26	331
113	289

No. 4702.

MRS. E. LEBLANC v. Succession of CHARLES MASSIEU.

A commission was issued to take the testimony of plaintiff, Mrs. E. LeBlanc, (Ernestine L. Chauveau), and her mother, then in France. This commission having been returned unexecuted, the defendant moved, *ex parte*, to take the answers for confessed, and the order was accordingly made.

This was clearly wrong. There is no law to authorize the testimony of a witness to be taken for confessed. These interrogatories on facts and articles were propounded to the plaintiff, who was then in France, but they were returned unanswered, as Mrs. LeBlanc had come back to Louisiana.

Thereupon the defendant filed a supplemental answer with interrogatories on facts and articles and asked that they be answered in open court. Objections were made to the interrogatories by the plaintiff's attorney—among others—that they were vague, impertinent and had nothing to do with the real issue in the cause.

The Judge *a quo* sustained the objections, except as to the first question which was ordered to be answered. The ruling was correct. If she had failed to answer at all, she would have been protected, as the order did not fix a day on which she was to answer. But the plaintiff appeared in court and answered it.

The plaintiff having offered herself as a witness, the defendant objected to this, on the ground that her answers to interrogatories as a *witness* having been taken for confessed, she could not be permitted to testify. The Judge properly overruled the objection. If the defendants really wanted her testimony, when she was upon the stand as a witness they might have obtained it, if responsive to the matters at issue.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. G. Schmidt*, for plaintiff and appellee. *John Culbertson*, and *E. Bermudes*, for defendants and appellants.

LUDELING, C. J. On the sixteenth of February, 1872, the plaintiff brought suit against the executors of the succession of C. Massieu on the following instrument, "Good for ten thousand dollars payable to Miss Ernestine L. Chauveau, after my death, value received, New Orleans, September 26, 1842. C. MASSIEU."

There were dilatory exceptions filed, which were properly overruled by the District Judge.

The answer contains a general denial—a denial of the signature, and a further denial that there was any lawful consideration for the note. There was judgment in favor of the plaintiff, and the defendants have appealed.

A commission was taken out to take the testimony of Ernestine L. Chauveau and her mother in France. This commission having been returned unexecuted, the defendants moved, *ex parte*, to take the answers for confessed, and the order was accordingly made.

This was clearly wrong. There is no law to authorize the testimony of a *witness* to be taken for confessed. These interrogatories on facts and articles were propounded to the plaintiff, who was then in France, but they were returned unanswered, as Mrs. Chauveau had returned to Louisiana. Thereupon the defendants filed a supplemental answer, with interrogatories on facts and articles, and asked that they be answered in open court. Objections to the interrogatories were made by

LeBlanc v. Succession of Massieu.

the plaintiff's attorney, among others these, that they are vague, impertinent and have nothing to do with the real issue in the cause.

The Judge *a quo* sustained the objections, except as to the first question which was ordered to be answered. The ruling was correct. If she had failed to answer at all, she would have been protected, as the order did not fix a day upon which she was to answer. C. P. 351. But the plaintiff appeared in court and answered it. The plaintiff offered herself as a witness. The defendants objected to this, on the grounds that her answers to interrogatories as *a witness* having been taken for confessed, she could not be permitted to testify. The judge properly overruled the objection. If the defendants really wanted her testimony when she was upon the stand as a witness, they might have obtained it, if responsive to the matters at issue.

The genuineness of the note is fully proved and the defendants have failed to make good their defense.

It is therefore ordered and adjudged that the judgment of the court *a qua* be affirmed with costs of appeal.

MORGAN, J., *dissenting*. This action is instituted upon the following instrument.

"Good for ten thousand dollars, payable to Miss Ernestine L. Chauveau, after my death, value received. New Orleans, September 26, 1842.
C. MASSIEU."

Massieu died in November, 1871. He made an olographic will, dated, fifteenth of March, 1871. After several special bequests and dispositions of his property, to the extent of \$22,700, he made Gabriel de Feriet his universal legatee, and appointed him and J. G. Monroe, the executors of his will. In this will no mention is made of the obligation sued on. The property he left was inventoried at \$27,771 50.

Ernestine L. Chauveau, now Mrs. LeBlanc, brings this suit against the executors, and claims the sum mentioned in the foregoing document, alleging that it is wholly written and signed by the said Massieu, who was a near relative of petitioner and had a great friendship for her family, from whom he had received valuable services, and was under many obligations. After various exceptions, which were properly overruled, and motions for oyer of the document sued on, and for the appointment of experts to pass upon the genuineness thereof, the executors answered. They specially deny that the document declared upon was signed by Massieu, and they plead that, if genuine, it was given without any lawful consideration, which they aver they will establish.

It will thus be seen that the instrument sued on is an unconditional promissory note, not transferable by indorsement or delivery, payable to a person therein named, at a certain time, alleged to have been given for value, which is denied. The issue then is value or no value, which issue both plaintiff and defendants have tendered, one to the other.

The plaintiff has produced no evidence in support of what she alleges was the consideration of the note, to wit, relationship, friendship for her family, valuable services from them to him. Her evidence is confined strictly to the genuineness of the note, which is established beyond a doubt.

The defendants propounded interrogatories on facts and articles to the plaintiff, in which she is squarely and repeatedly asked what the consideration of the note was, and whether the consideration therefor was a valid one. Her counsel objected to her being forced to answer these questions upon the grounds :

First—That defendants being neither forced heirs nor creditors, they have no right to inquire into the morality or legality of their benefactor's acts.

Second—Because the charge of illegality or immorality of the obligation sued on is a *grievous injury* done their testator, and they can not be permitted to throw obloquy on his memory and render it odious to posterity.

Third—Because the obligations sued on purports to be for value received, and the inquiry must be limited to the genuineness of the signature.

Fourth—Because all the interrogatories, so far as they are not confined to the genuineness of the signature, are vague, impertinent, and have nothing to do with the real issue of the case.

The district judge sustained the exceptions, and the plaintiff did not answer, to which ruling defendants reserved their bill.

First—As executors, whether legatees or not, the defendants were bound to inquire into the validity and legality of every claim which is presented against the estate which they represent.

Second—We do not see what *grievous injury* can be done to the memory of the testator by his executors, by their simply trying to establish that an obligation which he is alleged to have given, is without consideration.

Third—Because the obligation sued on purports to be for value received, we do not understand that the inquiry must be limited to the genuineness of the signature.

Fourth—We do not find the interrogatories vague or impertinent, or that they have nothing to do with the real issues in the case. On

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the contrary, it appears to us that if they are answered as the defendants seem to think they will be, the plaintiff will, at all events, have made a strong case against herself.

The judge below was of the opinion that the instrument sued upon is a disguised donation under an onerous form, and much of the plaintiff's brief is taken up with authorities to the point that, if it be viewed in that light, it is equally valid and must be paid without deduction.

But in the opposition which she filed to the account of the executors' account in the succession she expressly declares the instrument sued on to be a "promissory note and obligation." In this suit against the executors she calls it an obligation. In her brief she asserts it to be "a debt of the succession which must be paid in preference to legacies."

Now, debt and donation are not convertible terms. The instrument sued on is either the one or the other, and it was for the plaintiff to fix its proper designation. She has chosen to call it a debt; she must therefore be held to establish the debt when put to the proof; and the defendants may be permitted to show that it does not exist. One defense to an action on a promissory note is want of consideration, and no one should be better able to prove the consideration for which it was given than the party in whose favor it is drawn. Now, as this note was made payable only to the plaintiff, and is sued on by her, it seems to me clear that the defendants are entitled to make her declare what the consideration was for which it was given. The ruling of the court, therefore, which denied to them this right was, in my opinion, erroneous.

I therefore dissent.

Rehearing refused.

No. 3360.

JAMES M. KANE v. JOHN W. ROBERTSON. JOS. HOY & CO., CAMPBELL & STRONG, Intervenor.

Robertson, the defendant, had drawn two drafts on T. H. & J. M. Allen & Co., made garnishees in this suit, who had verbally accepted the same to be paid, as far as possible, out of the proceeds of the sale of Robertson's cotton, then in their hands. This was a good acceptance, and the intervenors in this case, who are the holders of the accepted drafts, are entitled to have them paid out of the proceeds of said cotton.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Bentinck Egan*, for plaintiff and appellant. *E. Howard McCaleb*, for defendant and appellee. *Breaux, Fenner & Hall*, for intervenors.

MORGAN, J. We find the facts to be, that when the garnishees were served with process, they had in their hands the proceeds of seventeen

Kane v. Robertson.

bales of cotton, amounting, net, to \$1600, and one bale of cotton unsold, which, it is admitted, was worth \$80. .

Robertson, the defendant, had drawn two drafts on T. H. & J. M. Allen & Co., the garnishees, one in favor of Joseph Hoy & Co. for \$5 80, and one in favor of G. S. Kendall, who had indorsed the same over to Campbell & Strong for \$1020. These drafts had been presented to T. H. & J. M. Allen, who had verbally accepted the same, to be paid, as far as possible, out of the proceeds of the cotton. This was a good acceptance, and the proceeds of the cotton, it was properly held by the district judge, was to be paid over to the holders of the accepted drafts.

Judgment affirmed.

Rehearing refused.

No. 4796.

STATE ex rel. LOUIS GAGNET v. ADMINISTRATOR OF PUBLIC ACCOUNTS.

The purport of all the regulations made in relation to the matter of drainage into the Carondelet Canal and the Bayou St. John, from the act of the Legislature of March 10, 1858, appears to be, that the city was prohibited from such drainage; or, if persisted in, that it should indemnify parties injured thereby—such indemnity to be ascertained by experts as damages. A report of such experts fixed the sum of \$500 per month in favor of the relator after the first of July, 1869, *so long as such drainage should continue*.

The decision of this Court rendered in March, 1871, while the city was still draining into the Bayou St. John, limited the liability of the city to pay \$500 per month to the relator, for this draining privilege, to the end of his lease, which expires in April, 1878.

But that decree certainly did not bind the city to continue to drain into the Bayou St. John until the expiration of the relator's lease, whether it thought proper to do so or not. It was not bound to pay for a privilege after ceasing to use it and after having abandoned it in March or April, 1873, paying the relator up to that time.

The swamp back of the city is a natural reservoir which, in its turn, sends all its waters into the lake beyond, and if from natural causes any of those waters on their way to the lake are thrown back, so that through certain outlets connected with the Bayou, which the plaintiff himself can readily close, a portion of the swamp water, freed from smell and noxious matters, for a limited period of time finds its way into the Bayou, that state of things can not be called drainage by the city into the bayou.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. O. W. Huntington and T. Livingston*, for relator and appellant. *Geo. S. Lacey*, city attorney, for defendant and appellee.

TALIAFERRO, J. The relator applied for and obtained an order from the Superior Court requiring the defendant to show cause, on a day fixed, why a *mandamus* should not issue compelling him to receive and register on his books according to law a certain judgment rendered by the Supreme Court in the case of *Louis Gagnet v. the City of New Orleans*, (23 An. p 207) by which the plaintiff's right to require from the city a monthly payment of five hundred dollars for draining into the Bayou

St. John was limited to twenty-eighth of April, 1878, the time at which the plaintiff's lease is to expire. The Administrator of Public Accounts showed for cause, that by the judgment referred to in the plaintiff's petition, the city was compelled to pay the relator five hundred dollars per month for each and every month the city should drain into the Bayou St. John after the first of July, 1869, provided that such liability should in no event be regarded as accruing from and after the twenty-sixth of April, 1878. The respondent further shows, that the city has ceased draining into the Bayou St. John, and having paid the relator the amount required by the judgment up to the time of ceasing to drain into the said bayou, the judgment aforesaid has ceased to have effect either in law or equity.

The rule was discharged and the relator appeals. We think the judgment correct. We understand the purport of all the regulations made in relation to the matter of draining into the Carondelet canal and the Bayou St. John from the act of the Legislature of March 10, 1858, to be that the city was prohibited from such draining; or, if persisted in, it should indemnify parties injured thereby, such indemnity to be ascertained by experts as damages. Their report fixed the sum of \$500 per month after first July, 1869, *so long as such draining should continue*. The lease of the canal by the relator is to expire on the twenty-eighth of April, 1878. The decision of this court rendered in March, 1871, while the city was still draining into the Bayou St. John, limited the liability of the city to pay \$500 per month to the relator for this draining privilege to the end of his lease. But that decree certainly did not bind the city to continue to drain into the Bayou St. John until the expiration of the relator's lease, whether it thought proper to do so or not. It was not bound to pay for a privilege after ceasing to use it and which it abandoned in March or April, 1873, paying the relator up to that time. But there is an effort made to show that the City continues to drain into the bayou by means of the London avenue draining machine, by which a portion of the drainage water from the Third District is thrown into the swamp, and by this means the volume of water in the swamp is increased, and as a consequence, a large quantity of water is thrown into the bayou, thereby making more onerous the servitude to which it is subjected, and article 660 of the Civil Code and 13 An. 587, are referred to. We are unable to see the applicability of the article of the Code and the authority referred to. The respondent rejoins that the swamp is a natural reservoir which in its turn sends all its waters into the lake beyond; and if from natural causes, any of these waters on their way to the lake are thrown back, so that through certain outlets connected with the bayou, which the plaintiff himself can readily close, a portion of the swamp water, freed from smell and

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noxious matters, for a limited period of time finds its way into the bayou, that that state of things can not be called drainage by the city into the bayou.

We do not see that the relator has made out a case entitling him to the peremptory mandamus prayed for. We think it was properly refused.

Judgment affirmed.

No. 5176.

MARTIN & REGGET RONGGER v. KATHERINE KISSINGER.

Where it was urged, in contesting the validity of a will, that there is a distinction between domicile and residence, and the statement that the witnesses are domiciliated in this city, is not a compliance with the law which says, "witnesses residing in the place;"

Held—That this court is satisfied, that the notary used the word *domiciliated* as synonymous with *residing*, as it is, and without any consciousness of the legal distinction invoked by counsel.

In this instance an examination of the extracts of the will recited in the judgment, makes it manifest that, although said will is not artistically drawn, yet that the formalities mentioned in articles 1578, 1579 and 1580, R. C. C., are observed. There are no sacramental words prescribed by law.

If words are used which, taken all together, show that the notary did all that the law makes essential, the will is good as to form, although the notary may be confused in his manner of expressing himself. The object of the law is to have it appear from the will itself, that the prescribed formalities have been observed.

The statement that the witnesses were present and within hearing of the testator, all the time in which the will was written, taken in connection with the other statements, that it was written according to his dictation, (the testator's) and that all was done without interruption, *at one time*, must mean that the dictation, as well as the writing, was done in the presence of the witnesses.

It would have been more clear and accurate if the notary had used the words: "*as dictated*" instead of "*according to his dictation*;" but the latter expression, as used in this instance, means what the other does.

To adopt the construction contended for by counsel, would be refining a little more than the law does, and prescribing a fixed formula to be used by notaries, who all have their peculiar mode of expression.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Livaudais & Louque*, for plaintiffs and appellees. *Cotton & Levy*, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment annulling the nuncupative will by public act of Christian Rongger on grounds of informality. The will reads: "I, the notary, at the request of Philip Lorch, of this city, did repair to the residence of Christian Rongger, at the corner of Henry Clay avenue and Levee streets, in this city, where I found the said Christian Rongger sick in bed, of sound mind and memory, as he appeared to me, notary, and the three witnesses named and undersigned. Whereupon the said Christian Rongger did declare and dictate to me, notary, his last will and testament, and I did write down the same in mine own handwriting according to his said

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dictation, which is as follows." Here follow the dispositions, and the will concludes: "And I, the said notary, having read aloud all the foregoing to said testator in the presence of Jacob Hoffner, William Henry Hornens and Hannon Rolle, competent witnesses of lawful age and domiciliated in this city, said witnesses having been present and within hearing of said testator during all the time in which the foregoing last will and testament was written; and having written the foregoing last will and testament without interruption at one time, and having fulfilled all the formalities of law, without turning aside to other acts, he, the said testator, did again declare in presence of said three witnesses the foregoing to be his only true last will and testament, written according to his said dictation."

The grounds of informality are:

First—The will was not received by the notary in presence of three competent witnesses residing in the place where the will was executed.

Second—The same was not dictated by the testator to the notary in presence of the witnesses, nor written by the notary as dictated.

Third—All legal formalities requisite for the validity of the will were not fulfilled at one time without interruption, and without turning aside to other acts.

I. It is urged that there is a distinction between domicile and residence, and the statement that the witnesses were domiciliated in this city is not a compliance with the law, which says "witnesses residing in the place."

We are satisfied the notary used the word domiciliated as synonymous with residing, as it is, and without any consciousness of the legal distinction invoked by counsel.

II. and III. The essential formalities are, the will must be received by the notary in presence of three witnesses residing in the place or five not residing there; it must be dictated by the testator and written by the notary as it is dictated; it must be read to the testator in presence of the witnesses; express mention is made of the whole, observing that all those formalities must be fulfilled at one time without interruption, and without turning aside to other acts; it must be signed by the testator, or mention made of the reason of his not doing so, and by the witnesses or one for all. R. C. C. 1578, 1579, 1580.

The above extracts from the will, although not very artistic, make it manifest, we think, that those formalities were observed. There are no sacramental words prescribed by law. If words are used which taken all together show that the notary did all that the law makes essential, the will is good as to form, although the notary may be confused in his manner of expressing himself. The object of the law is to have it appear from the will itself that the prescribed formalities

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have been observed. In this instance we think a fair and legitimate construction of what the notary has stated, makes it appear that the will was received by him in presence of three competent witnesses; that it was dictated by the testator and written by the notary, while it was being dictated, in presence of the witnesses and read to the testator in their presence, and that all was done at one time, without interruption and turning aside to other acts, thus meeting the objections of plaintiffs. The statement that the witnesses were present and in hearing of the testator all the time in which the will was written, taken in connection with the other statements that it was written according to his (the testator's) dictation, and that all was done without interruption at one time, must mean that the dictation, as well as the writing, was done in the presence of the witnesses.

It would have been more clear and accurate if the notary had used the words "as dictated," instead of "according to his dictation;" but the latter expression, as used in this instance, means what the other does. To adopt the construction contended for would be refining a little more than the law does, and prescribing a fixed formula to be used by notaries, who all have their peculiar mode of expression.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant with costs.

MORGAN, J., *dissenting*. The rules regulating the *confection* of wills are simple, but they are, in my opinion, inexorable. Nullity is the result of their violation. In this case I do not find that the will in question was dictated in the presence of the witnesses. This I think indispensable, and I therefore dissent from the opinion of the majority.

LUDELING, C. J., *dissenting*. I concur in this opinion.

No. 4805.

LOUIS BARTHEL v. CITY OF NEW ORLEANS.

The collecting of certain rates fixed upon for the lease of a stall in St. Mary's Market, is not a tax upon plaintiff's occupation, which is unequal, oppressive and in violation of the Constitution. It is a rent which he pays per day for the stall he occupies, besides a certain sum on each beef, sheep, etc., which he offers for sale. The ordinance was in force when he rented the stall; it is then a contract entered into between himself and the city, the performance of which he can not injoin the city from exacting.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. C. Roselius, M. Grivot*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

MORGAN, J. Plaintiff has enjoined the defendant from collecting

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certain rates fixed upon for the lease of a stall in St. Mary's Market. He contends that it is a tax upon his occupation, which is unequal and oppressive and in violation of the constitution.

What the city demands of him is a rent and not a tax. He is to pay a certain price per day for the stall which he occupies, and a certain sum on each beef, sheep, etc., which he offers for sale. We do not see in what this violates the constitution. The ordinance was in force when he rented the stall. It was then a contract entered into between himself and the city, the performance of which he can not injoin the city from exacting.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, that there be judgment in favor of defendant, and the injunction herein issued be dissolved, the costs to be borne by plaintiff.

Rehearing refused.

No. 2953.

SPALDING, BIDWELL & McDONOUGH v. RHODA ROSEWOOD.

Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Richard Shackelford*, for plaintiffs and appellants. *Rogers & Blanc*, for defendant and appellee.

WYLY, J. The plaintiffs, alleging that they employed the defendant, an actress, to perform at their theatres for a certain period, and that she without cause broke her engagement, sue to recover \$1000 damages. They further allege that, notwithstanding her abandonment of said employment, she has instituted nine suits against them before a justice of the peace for \$90 each for services pretended to have been rendered under her said contract with them, and they sued out an injunction restraining her from proceeding further in the prosecution of said suits, and also from instituting any more suits of that kind against them.

The defendant moved to dissolve the injunction:

First—Because the court was without jurisdiction to issue it, the Eighth District Court having exclusive jurisdiction to issue injunctions in the parish of Orleans.

Second—Because the petition discloses no ground for an injunction, the Fourth District Court having no right to restrain the trial of suits

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before a justice of the peace, nor to prevent the defendant from prosecuting her claims before any court of competent jurisdiction.

On the trial of this motion the court very properly dissolved the injunction with \$100 damages, and the plaintiffs appeal.

Section three of act No. 2 of the acts of 1870, creating the Eighth District Court, provides that that court shall have exclusive jurisdiction in and for the parish of Orleans to issue injunctions, but that this act shall not be construed to prevent any judge from issuing an injunction to stay or regulate the execution of any judgment or order of seizure granted by him. This law was in force at the time the injunction in this case was granted. And as the Fourth District Court was without jurisdiction to issue the writ, that court certainly did not err in dissolving it. Besides, the court had no authority to restrain the trial of defendant's suits before the justice of the peace.

Judgment affirmed.

Rehearing refused.

No. 3283.

J. J. KREIDER v. CITY OF NEW ORLEANS.

The plaintiff, being ejected from his office of mayor of the city of Jefferson from the first of June, 1869, to the first of April, 1870, when the office ceased to exist by annexation of said city to the city of New Orleans, obtained by compromise, in a suit resulting from the unlawful interference with his rights, the sum of \$1500 from the party thus interfering under an appointment made by the Governor. This sum was paid out of the funds of the city of Jefferson, and the plaintiff now claims from the city of New Orleans, as successor of the city of Jefferson, the same amount for salary;

Held—That the compromising by plaintiff of the said suit, in which his right to the office was involved, concludes him from urging any demand against the city of New Orleans for his salary, admitting the liability of the city to pay a salary twice for the same services.

APPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Fellows & Mills*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

HOWELL, J. The plaintiff claims a salary as mayor of the city of Jefferson from first June, 1869, when he was ejected from said office, until first April, 1870, when the office ceased to exist by the annexation of said city to the city of New Orleans. In the suit, which arose at the first mentioned date, he was, on appeal, declared to be entitled to his office; but when the judgment became final, the Governor made appointment of another party, who enjoined the plaintiff from acting. This injunction was dissolved, and damages to the amount of \$2000 allowed Kreider, defendant in that proceeding, plaintiff here, and the other party appealed; but the suit was compromised, plaintiff Kreider

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receiving \$1500, which were paid out of the funds of the city of Jefferson. After this, the present suit was instituted and plaintiff obtained judgment for \$1500, and the city appealed. We are of opinion that the compromising of the said suit, in which his right to the office was involved, concludes plaintiff from urging any demand against the city for his salary, admitting the liability of the city to pay a salary twice for the same services.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment for defendant with costs.

Rehearing refused.

No. 3286.

PATRICK GALLAGHER AND WIFE v. B. ABADIE.

The defendant appeals from a judgment annulling an act of sale to him of plaintiffs' property under the enforcement of a judgment.

There is no evidence in the record that the property was seized by the constable who effected the sale, nor that there was a sufficient advertisement. It is proved positively that the appraiser in behalf of Gallagher and wife was appointed by a justice of the peace. A justice of the peace has no authority to appoint an appraiser in behalf of the defendant in execution at a forced sale.

An appraisement made by parties unauthorized to act is no appraisement. The property of the plaintiffs was therefore sold without appraisement, and the sale was invalid.

The objection that the plaintiffs have not returned nor offered to return the price of adjudication, and therefore ought not to succeed in their suit, has no force. The plaintiffs have received nothing to return, the defendant having purchased under his own execution. If he paid to the constable the balance of his bid in excess of the amount of the writ, that sum is yet in the hands of said constable. The plaintiffs, finding that their property had been illegally seized, refused to ratify the sale by claiming the balance of the funds in excess of the amount of defendant's writ.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. R. Shackelford*, for plaintiffs and appellees. *E. Cambray, E. Phillips, J. S. Whitaker*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment annulling the sale of the property described in the petition, which he acquired from the plaintiffs under the enforcement of his judgment for one hundred dollars against them. The ground for nullity is that the constable did not comply with the formalities required by law in selling the house and lot of the plaintiffs; there was no seizure, no sufficient advertisement, and no legal appraisement of the property.

The return on the *fieri facias* reads as follows: "Received, New Orleans, October 19, 1869. Served notice on defendant personally on twenty-first of same month and year, and three days after proceeded to advertise the property of the defendant situated on St. Ann street, between Dorgenois and Broad, which was sold at public auction at the Merchants' and Auctioneers' Exchange, on Royal street, between Cus-

Gallagher and Wife v. Abadie.

tomhouse and Canal streets. Said property was sold to the highest bidder, Mr. Abadie, on the twenty-seventh day of November, 1869, at twelve o'clock, for the sum of \$425 cash, in United States treasury notes.

“CHARLES BETAT,
“Deputy Constable.”

There is no evidence in the record that the property was seized by the constable, nor that there was a sufficient advertisement. It is proved positively that the appraiser in behalf of Gallagher and wife was appointed by a justice of the peace. A justice of the peace has no authority to appoint an appraiser in behalf of the defendant in execution at a forced sale. An appraisement made by parties unauthorized to act is no appraisement. The property of the plaintiffs was therefore sold without appraisement and the sale was invalid.

The defendant, however, objects that the plaintiffs have not returned nor offered to return the price of adjudication, and therefore ought not to succeed in their suit.

The plaintiffs have received nothing to return, the defendant having purchased under his own execution. If he paid to the constable the balance of his bid in excess of the amount of the writ, that sum is yet in the hands of the constable. The plaintiffs, finding that their property had been illegally sold, properly refused to ratify the sale by claiming the balance of the funds in excess of the amount of defendant's writ. We see no error in the judgment.

Judgment affirmed.

Rehearing refused.

No. 3040.

DAVID C. McCAN v. FULKERSON, McLAURIN & Co. and THE NEW ORLEANS MANUFACTURING AND BUILDING COMPANY.

The plea of novation is established in this case. The plaintiff had an account against the New Orleans Manufacturing and Building Company. For this account the note sued upon was given. The account was receipted in full, and the debtors, Fulkerson, McLaurin & Co. were substituted for the old debtor.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. R. H. Marr*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendants and appellants.

LUDELING, C.J. The plaintiff sued the defendants on the following note:

\$2531 73-100.

NEW ORLEANS, April 18, 1867.

Sixty days after date we promise to pay to the order of D. C. McCAN twenty-five hundred and thirty-one dollars and seventy-three cents for value received, with interest at the rate of eight per cent. per annum after maturity until paid.

FULKERSON, McLAURIN & CO.

McCan v. Fulkerson, McLaurin & Co. and the New Orleans Manufacturing and Building Co.

The petitioner demanded judgment against the defendants *in solido*, and that five hundred and ten shares of the stock of said company, pledged by H. S. Fulkerson to pay certain of his creditors, including petitioner, be seized and sold to satisfy his demand.

The following is a copy of the alleged pledge alluded to:

NEW ORLEANS, May 25, 1867.

The undersigned, in behalf of the New Orleans Manufacturing and Building Company, acknowledge receipt from Mr. H. S. Fulkerson of five hundred and ten shares of his stock of the company, which are to be disposed of towards paying the liabilities that may exist against the company, and for which Mr. Fulkerson is personally responsible. Should there be an excess of funds or stock, the same to become the property of Mr. Fulkerson and be returned to him. Mr. Fulkerson desires the following claims to be liquidated by the sale of his stock: Amount due the New Orleans Manufacturing and Building Company, \$2000; amount due J. L. Lobdell, \$2250 92; amount due Charles Donnelly, \$1757 73; amount due D. C. McCan, \$2631 73, and such other small bills, as yet unascertained, as may be approved by Mr. Fulkerson, supposed not to exceed \$1000.

For the New Orleans Manufacturing and Building Company:

(Signed)

LOUIS SCHNEIDER,
J. H. BLAFFER, Treasurer.

Witness: ED. SCHNUGANS.

Accepted: H. S. FULKERSON.

The New Orleans Manufacturing and Building Company filed a general denial, and also pleaded novation of the debt originally due to the plaintiff.

There was judgment against Fulkerson, who made no defense, and against the New Orleans Manufacturing and Building Company. The other members of the firm of Fulkerson, McLaurin & Co. were discharged under the bankrupt law. The company alone has appealed.

We think the plea of novation is established. The plaintiff had an account against the New Orleans Manufacturing and Building Company, or the Delachaise Building Company. For the sake of argument we will consider it to have been against the New Orleans Manufacturing and Building Company. For this account the note sued upon was given and the account was receipted in full, and the debtors Fulkerson, McLaurin & Co. were substituted for the old debtor. See 2 N. S. 144; 6 N. S. 637; 2 La. 111; 16 La. 140; 4 An. 543; 14 An. 54.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment against the plaintiff and in favor of the defendant rejecting the demands, with costs in both courts.

Rehearing refused.

No. 4618.

**STATE OF LOUISIANA v. CHARLES CLINTON, Auditor, and A. DUBUCLET
Treasurer. NEW ORLEANS, MOBILE AND TEXAS RAILROAD COM-
PANY, Intervenor.**

The State, on the petition of the Attorney General, having enjoined the Auditor and the Treasurer from issuing warrants for the payment of and from paying certain obligations of the State, and having prayed to have the appropriations therefor and the said liabilities declared null, the New Orleans, Mobile and Texas Railroad Company intervened and moved to dissolve the injunction so far as it applied to the bonds of the State issued to said company.

The grounds of the injunction were that the appropriation for the payment of the coupons of said bonds is a disguised donation of the funds of the State to a private corporation; that the Governor had no authority to subscribe for the stock of said company, and that the act 95 of 1871, by virtue of which the said bonds were issued, attempted to create a debt exceeding \$100,000, without providing adequate means for its payment as required by article 111 of the State constitution, and also in excess of the constitutional limitation to the State indebtedness.

It is contended, on the other side, that the State can not sue to annul the bonds in question without first tendering back the stock which it is admitted has been received by the State in exchange for the bonds.

The doctrine of tender could not be properly applied to this case. The State does not seek to annul the contract and recover back the bonds given as the price. The law officer of the State simply asks that her fiscal agents be prohibited from paying certain bonds and coupons, on the ground that the law which authorized their issuance is unconstitutional.

The suit was not against the holders of the bonds, or the parties to the contract, and there was no one to whom the tender of the certificate of stock could be made. The injunction or prohibition issued on the petition of the Attorney General, made it legally impossible, while it existed, for the fiscal agents to pay, and in this way only were the rights of the intervening company affected, and the necessity imposed upon the company to take some legal proceedings to obtain payment. They chose to intervene in these proceedings in order to assert their rights and remove the obstructions to their access to the State treasury. They are therefore not in a position to plead that a tender of the stock should have been made to them before the issuance of the injunction herein, although it practically closed the treasury to them. But any judgment in the suit to which they were not made parties, would not have been *res judicata* as to them.

This case must be remanded for further evidence and such proceedings as may be appropriate.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, *J. Q. A. Fellows, J. B. Cotton, Whitaker & Denégre*, for the State. *Howe, Prentiss and Alexander Walker*, for intervenor.

HOWELL, J. The State, on the petition of the Attorney General, having enjoined the Auditor and Treasurer from issuing warrants for the payment of interest on, and from paying quite a list of the obligations of the State, and prayed to have the appropriations therefor and the said indebtedness declared null, the New Orleans, Mobile and Texas Railroad Company intervened in the suit and moved to dissolve the injunction, so far as it applied to the bonds of the State issued to said company.

The grounds of the injunction, in this respect, are that the appropriation for the payment of the coupons of said bonds is a disguised donation of the funds of the State to a private corporation; that the

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Governor had no authority to subscribe for the stock of said company, and the act 95 of 1871, by virtue of which the said bonds were issued, attempts to create a debt exceeding \$100,000 without providing adequate means for its payment, as required by article 111 of the State Constitution, and also in excess of the constitutional limitation to the State indebtedness.

The injunction was dissolved as to the intervenor, and the other parties appealed.

It is contended, on behalf of appellee, and we think correctly, that the State can not sue to annul the bonds in question without first tendering back the stock, which it is admitted has been received by the State in exchange for the bonds. There is not even an allegation of such tender, which, it is suggested, the Legislature alone is competent to make or authorize.

Judgment affirmed.

WYLY, J. I was not present at the consultation at which this case was decided, and, therefore, I took no part in this decision.

ON REHEARING.

HOWELL, J. The doctrine of tender was improperly applied in our former opinion. The State did not sue to annul the contract of sale and recover back the bonds given as the price. The law officer of the State, representing his principal, simply asked that the fiscal agents of the State be prohibited from paying the bonds and coupons described in the petition, on the ground, among others, that the laws authorizing the issuance of the bonds and making appropriations to pay the coupons, are unconstitutional. The suit was not against the holders of the bonds or the parties to the contract, and there was no one to whom the tender of the certificate of stock could be made. The injunction or prohibition, issued on the petition of the Attorney General, made it legally impossible, while it existed, for the fiscal agents to pay, and in this way only were the rights of the intervening company affected, and the necessity imposed on the company to take some legal proceedings to obtain payment.

They chose to intervene in these proceedings in order to assert their rights and remove the obstructions to their access to the State treasury. They are therefore not in a position to plead that a tender of the stock should have been made to them before the issuance of the injunction herein, although it practically closed the treasury to them. But any judgment in the suit, to which they were not made parties, would not have been *res judicata* as to them.

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The question arises, are they, having made themselves parties, entitled to have the injunction removed so far as it affects them. The case is not without difficulty. It is submitted on the pleadings, with the single admission that the State holds the certificate of stock, made, we presume, with reference to the plea of tender, and we are expected to determine the rights of the parties in interest, vast as they may be, upon the face of the papers.

It is contended, on behalf of the State and the people of the State, that the obligation of the State to indorse the second mortgage bonds of the intervening company and in lieu of which the purchase of stock was substituted was contingent, and that the conditions, upon which that obligation was to be fixed, had failed prior to the passage of the act authorizing the purchase of the stock and issuance of the bonds to pay for it, and hence the issuance of the bonds was the creation of a debt in violation of the prohibition amendment to the Constitution. This failure is said to be notorious, to wit: the nonconstruction of the branch road or any part thereof within the time prescribed by act 26 of 1869, under the provisions of which the company's bonds were to be guaranteed. If it be true that, at the date of the said act No. 95, the obligation of the State, in favor of the railroad company, was extinguished or had lapsed, the said act 95, authorizing the issuance of the bonds in question, was the creation of a new debt; but we are not prepared to say that such a fact may be judicially noticed, even in behalf of the public. But its importance is such that we are unwilling to hold the public responsible for the omission to furnish the necessary proof, and we have concluded to remand the case for evidence on the point and such other evidence and proceedings as may be appropriate.

It is therefore ordered that our decree herein be set aside; that the judgment appealed from be reversed, and this case be remanded for the taking of evidence and to be proceeded with in accordance to law.

IN EXPLANATION.

HOWELL, J. Upon our attention being specially called, by intervenor's counsel, to the various acts of the Legislature relative to the New Orleans, Mobile and Texas Railroad Company, we find that the hypothesis, as to the extinguishment of the State's contingent liability, upon which we based our decree, can not probably be supported; but we are none the less indisposed to decide the case in its present condition, as there are other important matters involved, and we can not resist the conviction that justice requires the case to be heard again in the court of the first instance, where it can be fully and fairly presented. In saying this we do not wish to be understood as sanctioning a second application for rehearing.

Wang v. Field.

No. 3117.

FREDERICK WANG v. SPENCER FIELD.

The proceedings in this case appear to have been irregular. The plaintiff founds his right upon the provisions of article 3268 of the Civil Code, and yet he has failed to comply with its provisions. No separate appraisement was made of the lot of ground and the building he claims a privilege upon. The building was sold separately and without any reference to the ground it stood upon; in other terms, as if there were no connection whatever between them and no rights against both existing in other persons. Under this state of facts the sale of the house was a nullity.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. W. H. Rogers*, for plaintiff and appellee. *Bentinck Egan*, for defendant and appellant.

TALIAFERRO, J. One Herman bought from the defendant, Field, a lot or square of ground and erected a building upon it, Popp & Elliot, lumber dealers, furnishing the lumber used in its construction. They subsequently sued Herman for the price of the material furnished by them, obtained judgment with recognition of their lien upon the building, seized it under execution, and at the sheriff's sale, Wang, the plaintiff, bought it. This sale took place on the thirteenth of January, 1869. Field, having Herman's notes secured by mortgage on the lot or square of ground for the unpaid part of the price, took out executory process and caused the property to be seized and sold, and he became the purchaser on the second of February, 1869. He refused to permit Wang to remove the building Herman had erected on the lot, and Wang sued him in this action either to deliver the building to him or pay him the value of it which he alleges is worth \$1000.

The answer is a general denial. Defendant avers that he is the owner of the house claimed by the plaintiff, alleging his purchase of the entire property at the aforesaid sheriff's sale, made on the second of February, 1869; that under the executory process issued on the second of December, 1868, the property was under seizure by the sheriff, and in his custody from the time of its seizure until the sale on the second of February, 1869, and that the seizure was made under executory process before the plaintiff's pretended purchase; that he could not have acquired any title to the building in question from the fact that the lot of ground and improvements upon it were under special mortgage to the defendant to secure the payment of the purchase price to him under his sale of the premises to Herman.

The judgment of the lower court was rendered in conformity with the prayer of the plaintiff's petition, and the defendant has appealed.

The plaintiff founds his right upon the article 3268 of the Civil Code: "When the vendor of lands finds himself opposed by workmen seeking payment for a house or other work erected on the land, a

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separate appraisement is made of the ground and of the house, the vendor is paid to the amount of the appraisement on the land and the other to the amount of appraisement of the building."

The proceedings appear to have been irregular. The plaintiff founds his right upon the provisions of the article of the Civil Code just quoted, and yet he has failed to comply with those provisions. No separate appraisement was made of the lot of ground and the building he claims a privilege upon. The building was sold separately and without any reference to the ground it stood upon; in other terms, as if there were no connection whatever between them, and no rights against both existing in other persons. Under this state of facts the sale of the house was a nullity.

It is therefore ordered that the judgment of the district court be annulled and reversed. It is further ordered that this suit be dismissed at plaintiff's costs, reserving to him and all the other parties in interest the right to renew proceedings according to law to enforce their privilege, if they have any, against the building erected on the premises by Herman.

No. 3312.

GLOVER & ODENDAHL *v.* GEORGE B. SHUTE. CITIZENS' BANK OF LOUISIANA intervenor.

This suit was instituted to enforce the vendor's privilege on certain barrels of flour shipped for Liverpool, for which the whole price had not been paid. The Citizens' Bank intervened, claiming the control of the property by virtue of the bills of lading upon which it had made advances to the shippers. In this court the bank pleaded specially the want of registry necessary to preserve the plaintiffs' privilege. The plaintiffs objected that the question was not raised in the lower court, and that as, under article 805 C. P., the Supreme Court can only execute its jurisdiction in so far as it shall have knowledge of the matters argued or contested below, the point can not be urged here. This objection is not well founded, because the matter contested below was the privilege claimed by the plaintiffs, and as they have failed to show that they have preserved their privilege in the manner prescribed by law, they can not enforce it to the prejudice of the intervenor, holding the evidence of title.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Randolph, Singleton & Browne* and *C. B. Buddecke*, for plaintiffs and appellees. *P. J. Robert*, curator *ad hoc*, for Shute. *A. Pitot*, for intervenor and appellant.

HOWELL, J. The plaintiffs sold and delivered to the defendant a certain number of barrels of flour, which were shipped on board the bark Minot, loading for Liverpool, and the whole price not being paid, this suit was instituted to enforce the privilege under act 3227 R. C. C. The Citizens' Bank intervened claiming the control of the property by virtue of the bills of lading upon which it made advances to the shipper,

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Shute. Judgment was rendered in favor of the plaintiffs and the bank appealed. In this court the bank pleaded specially the want of registry necessary to preserve the plaintiffs' privilege.

To this the plaintiffs answer that the question was not raised in the lower court, and as under article 805 C. P., the Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below, the point can not be argued here. The reply is simple, that the matter contested below was the privilege claimed by the plaintiffs, and as they have failed to show that they have preserved their privilege in the manner prescribed by law, they can not enforce it to the prejudice of the intervenors, holding the evidence of title. They have failed to make out their case, and they do not pretend that if the point had been raised below, they could have shown a registry.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the intervenor, the Citizens' Bank of Louisiana, decreeing it entitled to the proceeds of the property sequestered herein, and costs in both courts.

No. 3383.

EMILY J. ROBERTSON v. THOMAS J. EMERSON and GEORGE F. PORTER..

The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Wm. Grant and Wm. H. Hunt*, for plaintiff and appellee. *O. F. Buck*, curator *ad hoc*, for G. F. Porter, defendant and appellant.

MORGAN, J. The plaintiff in this injunction was not a party to the suit in the Fifth District Court, nor is she attempting to interfere with the judgment therein rendered. She claims to be entitled to its benefits, and to prevent the plaintiff from executing the same to her prejudice. The act of 1870, which organized the Eighth District Court, gave to that court the power to grant injunctions, but at the same time declared that the act should not be so construed as to prevent any judge or court from issuing an injunction to stay or regulate the execution of any order of seizure granted or judgment rendered by said judge or court. Perhaps, under this statute, she might have applied to the Fifth District Court, but we think she could also seek relief from the Eighth District Court.

On the merits, we think the reasons of the district judge correct, and, for the reasons assigned by him, the judgment is affirmed.

WYLY, J., *dissenting*. In this case the question is, had the Eighth District Court jurisdiction to injoin the execution of a judgment of the Fifth District Court? The solution of this question depends upon the construction to be placed upon section 2 of act No. 2 of the extra session of 1870. This section provides: "That the Eighth District Court, hereby created, shall have exclusive jurisdiction in and for the parish of Orleans, to issue writs of injunction, mandamus, quo warranto, and to entertain all proceedings, suits or contestations in which the right to an office, State, parish or municipal, is in any way involved; * . . * provided, that nothing in this act shall be construed to in any manner limit or affect the right of the Supreme Court of the State of Louisiana to issue, hear and determine any or all writs or orders which, by existing laws, said court has authority to issue, hear and determine; and provided further, that this act shall not be so construed as to prevent any judge or court from issuing an injunction to stay or regulate the execution of any order of seizure granted or judgment rendered by said judge or court."

Now, if the Eighth District Court can stay or regulate the execution of judgments of the Fifth District Court, by the use of the writ of injunction, to that extent the last mentioned court will be limited or restricted in the right to stay or regulate the execution of its own judgments. Yet, the statute granting the power to the Eighth District Court, expressly provides that the authority granted shall not be so construed as to prevent any judge from regulating the execution of his own judgments, by the use of the writ of injunction.

Two courts can not at the same time regulate the execution of a judgment. If one undertakes to regulate it by employing the writ of injunction, the other must necessarily, for the time being, be prevented from or deprived of the control or regulation thereof. Otherwise there will be a conflict of jurisdiction, which it was one of the main objects of the statute in question to prevent.

The objects of the act, as expressed in the title, were to create the Eighth District Court, define its jurisdiction, and to "determine the jurisdiction of the existing seven district courts for the parish of Orleans."

Undoubtedly, power is reserved to the other district courts to employ the writ of injunction to stay or regulate the execution of their own judgments; and if the same power is conferred on the Eighth District Court, as my associates seem to interpret the act, it must be a con-

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current power. Yet the statute will be searched in vain to find a grant of concurrent jurisdiction in regard to the right to issue an injunction.

The power is vested exclusively in the Eighth District Court, except in regard to the subject of staying or regulating the execution of the judgments of the other district courts.

In seeking the interpretation of a statute it is proper to take into consideration the object or motive of the law giver in enacting it; also the evil which it was intended to remedy.

At the time the law was passed, the several courts of this parish had authority to issue the writ of injunction; sometimes one court would grant an injunction and another would issue a counter injunction, embarrassing thereby the officers of court and bringing the administration of justice into contempt.

It was the confusion resulting from the concurrent jurisdiction of these courts in this respect, which led to the enactment of the law. This was the evil which the lawgiver sought to remedy.

To accomplish the object it was deemed expedient to create the Eighth District Court and to give it exclusive jurisdiction to issue the writ of injunction, except in regard to the right of staying or regulating the execution of judgments of the other district courts, which right was reserved to each court over its own judgments.

With this object in view, I do not believe the legislature intended to give the Eighth District Court concurrent jurisdiction with regard to the execution of the judgments of the other district courts; because, this would produce a conflict of authority, and, in a measure, defeat the intention of the law.

I therefore dissent in this case.

Rehearing refused.

No. 3304.

VICTOR TANNER v. S. CAMBON.

Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. This court is not satisfied that he was employed by the year. Besides, on his being paid for the time he worked at the rate of \$1500 per annum, he took the money without objection.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. T. Fellows*, for plaintiff and appellee. *Johnson & Denis*, for defendant and appellant.

MORGAN, J. Plaintiff alleges that he was engaged by the defendant to perform the duties of clerk, at an annual salary of \$1500, to commence on the first day of October, 1870, and to end on the thirtieth

September following; that he faithfully performed his duty until the fifteenth October, when he was illegally and without cause discharged. He sued for the year's salary, \$1500, and he had judgment.

The evidence of the plaintiff himself does not satisfy us that Cambon contracted to employ him by the year; neither is there any evidence that he was employed by the year in the place which he says he left to go to Cambon's, although he had been employed there several years, and it is not shown that the custom is among persons engaged in Cambon's business to employ clerks by the year, while the testimony of Cambon is positive that he never made such an engagement with him. Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. He was paid for the time he worked at the rate of \$1500 per annum, and took the money without objection.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendant with costs in both courts.

No. 4963.

C. CAMUTZ, Syndic, v. THE BANK OF LOUISIANA, L. F. GENERES, Garnishee.

The plaintiff having obtained judgment against the Bank of Louisiana, took garnishment process against Generes and sought to make him liable. Generes excepts on several grounds, and among others—that the plaintiff made proof before a register of the United States District Court of the judgment obtained by him against the said bank which had been declared bankrupt, and filed his proof with the assignees on July 3, 1871, thereby making himself a party to the bankrupt proceedings and abandoning all other rights, liens and privileges against the bankrupt, except those reserved by said proof; that by the order of the United States District Court, rendered July 1, 1869, all persons were enjoined and restrained from interfering with the assets or property of the bank. The exceptions were correctly sustained by the court *a qua*.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George L. Bright*, for plaintiff and appellant. *Clarke, Bayne & Renshaw*, for defendant and appellee.

TALIAFERRO, J. The plaintiff having obtained judgment against the Bank of Louisiana, took garnishment process against Generes and sought to make him liable. Generes excepted on the grounds:

First—That on the twenty-second May, 1868, at the suit of the State against the Louisiana Bank a judgment was rendered annulling its charter and staying all judicial proceedings against the bank. The president of the bank was enjoined from paying out any of its funds or disposing of any of its assets, and the judgment also provided for placing the affairs of the bank in liquidation.

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Second—That in January, 1870, the said bank was decreed bankrupt by the District Court of the United States, sitting in Louisiana, and all its assets were assigned to Aristide Miltenberger, and Emory E. Norton appointed assignee.

Third—That the plaintiff, C. Camutz, syndic, made proof before a register of the United States District Court, of the judgment obtained by him against the said bank and filed his proof with the assignee on the third of July, 1871, thereby making himself a party to the bankrupt proceedings, and abandoning all other rights, liens and privileges against the bankrupt except those reserved by said proof.

Fourth—That by the order of the United States District Court, rendered July 1, 1869, all persons were enjoined and restrained from interfering with the assets or property of the bank.

The exceptions were sustained and the rule taken dismissed. The plaintiff appeals. The evidence sustains the allegations made in the exceptions, and we think the judgment of the lower court correct.

Judgment affirmed.

No. 5063.

GEORGE L. WALTON v. POLICE JURY, Parish of Concordia, et als.

The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute his appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment; nor is it impossible to declare the judgment null and inoperative as to the appellants, and leave it undisturbed as to the others against whom it is rendered.

One judgment debtor has the right to be relieved from an erroneous judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The exception to the jurisdiction of the court below, *ratione materiae*, should have been sustained, the interest of the plaintiff being less than five hundred dollars. Plaintiff has no greater right to annul or enjoin in this proceeding the bonds issued by the police jury of the parish of Concordia, than if he were resisting the payment of his tax levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

APPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J. George S. Sawyer and John Ray*, for plaintiff and appellee. *Wm. B. Spencer*, curator *ad hoc* for one of the appellants, and attorney for the other.

HOWELL, J. A motion is made to dismiss this appeal on the ground that the motion and order for appeal were made and granted on behalf of some ninety non-resident parties represented by the curator *ad hoc*, and only one had executed bond, and that the appeal is taken by the said one party and one resident, each of whom has furnished a bond,

and the court can not disturb the judgment as to said appellants and leave it in force as to all the others, the effect of which judgment being to annul certain bonds issued by the police jury of Concordia, and they must be valid in whole or invalid in whole.

The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees and the appellant has the right to prosecute his appeal which is regularly taken, although his co-defendants may acquiesce in the judgment. Nor is it impossible to declare the judgment null or inoperative as to the two appellants and leave it undisturbed as to the others against whom it is rendered. One judgment debtor has the right to be relieved from an erroneous judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The motion to dismiss must be refused.

The plaintiff, a taxpayer in the parish of Concordia, enjoined the police jury of said parish from levying any further tax on his property to pay any interest or principal of certain bonds, also the tax collector from collecting the tax already levied upon his property for such purpose, and the parish treasurer from paying the interest or principal of said bonds, and he prayed that said bonds be declared null, contradictorily with said officers and the bondholders on various grounds. He caused the said parties to be cited personally and through a curator *ad hoc* appointed to represent the non-resident bondholders.

After hearing the parties, the district judge rendered judgment perpetuating the injunction and annulling the bonds from which one resident and one non-resident bondholder appealed.

The first question presented is an exception to the jurisdiction of the court below *ratione materiae*, the interest of the plaintiff being less than five hundred dollars. He alleges that his annual parish tax amounts to some four hundred dollars, and a large portion thereof is required to pay the interest, accruing annually on the bonds in question. As to his right to annul or enjoin the bonds in this proceeding, he has no greater rights than if he were resisting the payment of his tax, levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

It is therefore ordered that the judgment appealed from and the proceedings in this suit in the district court, be declared null and the action be dismissed as to the appellants. Costs in both courts to be paid by appellees.

Rehearing refused.

Kendig & Co. v. City of New Orleans.

No. 4770.

KENDIG & Co. v. CITY OF NEW ORLEANS.

The permission to erect a platform scales with a covering at the coal landing in the Second District, city of New Orleans, was granted to the plaintiffs by resolution of the City Council on the eighteenth of June, 1872, provided "that this permission be revocable at the pleasure of the council." The plaintiffs pray for an injunction to prevent the city from removing the platform and covering erected over it, and also sue for damages. After the trial in the court below, and after an appeal had been taken and the record filed in this court, the City Council, on the twenty-ninth of July, 1873, passed an ordinance revoking the permission granted to plaintiffs.

The judgment of the court *a qua* making the injunction perpetual is affirmed, with the proviso and understanding that said injunction must be treated and considered as resting alone upon the state of facts existing at the trial of the cause in the court below, and without prejudice to the city to set up a claim to the quiet and undisturbed possession of the place in controversy under any ordinance revoking the permit granted to plaintiffs.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Bentinck Egan and Fellows & Mills*, for plaintiffs and appellees. *George S. Lacey*, City Attorney, for defendant and appellant.

TALIAFERRO, J. The defendant in this case appeals from a judgment of the court *a qua* perpetuating an injunction taken by the plaintiffs, restraining the city from preventing and obstructing them in the pursuit of their business as dealers in coal, at a coal boat landing opposite the United States Mint, in the lower portion of the city of New Orleans.

The plaintiffs alleged in their petition that they had, by permission of the city authorities, erected a platform scales with a covering, for the purpose of weighing their coal when landed, and gone to large expense in that work and in removing sunken piles and other obstructions at the landing in order to render the landing of coal boats at that point safe and convenient. That notwithstanding the permission granted to them for carrying on their business in that locality, the city authorities had formally notified them to remove their coal barges, etc., from the said landing within twenty-four hours, and threatened, in case the order was not executed, to remove them at the plaintiffs' risk and expense. An injunction was prayed for and obtained, the plaintiffs praying judgment perpetuating the writ and for six hundred dollars damages.

The plaintiffs had judgment perpetuating the injunction and the city has appealed.

The permission to erect their platform scales at the coal landing in the Second District, was granted to the plaintiffs by resolution of the City Council on the eighteenth of June, 1872, in the following terms:

"No. 1590. Resolved by the Council of the city of New Orleans, That permission is hereby given to Kendig & Co. to erect, on the coal

landing in the Second District, a platform scales with a covering for the purpose of weighing coal; provided, that this permission is revocable at the pleasure of the Council."

On the twenty-ninth of July, 1873, a repealing resolution was passed in the following terms:

"Resolved, That ordinance No. 1590, Administration Series, granting permission to Kendig & Co. to erect platform scales on the coal landing in the Second District, for the purpose of weighing coal, is hereby repealed."

It further appears by a city ordinance passed July 6, 1866, that "two hundred feet from Esplanade street up" was set apart "as a coal boat landing during the pleasure of the Council."

The frail tenure by which Kendig & Co. set up a right to occupy the coal landing in question, it is obvious, must give way to the wants and convenience of the public and the superior right of the City Council to control and regulate the wharves and landings of the city in the interests of the public. Kendig & Co. had simply a permissive right to occupy a space at the coal boat landing in the Second District temporarily, until the city authorities deemed it proper to make some other disposition of the space appropriated by the ordinance of June, 1866, for the landing of coal boats—the appropriation of "two hundred feet from Esplanade street up" for a coal boat landing, being expressly revocable at the will of the City Council. The plaintiffs accepted the privilege of erecting their platform scales within a space which the City Council could at any moment appropriate to some other use than that of a coal boat landing, and they accepted the gratuitous favor of conducting their business there, the permission being "revocable at the will of the Council." The condition then of the plaintiffs was but little better than that of a poor pensioner on the bounties of an hour.

When the City Council decided to build a wharf there, and entered into a contract with undertakers to perform the work and notified the plaintiffs to remove their boats, etc., which formed an impediment to the prosecution of the work contracted for, it was with but little grace that the plaintiffs set up a claim to continue their possession and to raise the question of the city's right to build a wharf at the coal boat landing, and to go into the inquiry also of the expediency and even of the practicability of the work. We think the judgment of the lower court erroneous and that it should be set aside.

It is therefore ordered that the judgment of the court *a qua* be annulled and set aside. It is further ordered that the injunction be dissolved and that the defendant have judgment in its favor, the plaintiffs and appellees paying costs in both courts.

Kendig & Co. v. City of New Orleans.

ON REHEARING.

TALIAFERRO, J. We find on reviewing this case that our decree was rendered upon insufficient evidence and should be reversed. It is therefore ordered that the former decree rendered be avoided and set aside, and it is now ordered that the judgment of the district court be affirmed, with the proviso and understanding, that the injunction rendered perpetual by that judgment be treated and considered as resting alone upon the state of facts existing at the trial of the cause in the court *a qua*, and without prejudice to the city to set up a claim to the quiet and undisturbed possession of the place in controversy under any ordinance revoking the permit granted to Kendig & Co. The appellees paying costs of this appeal.

No. 3284.

COHEN & WILSON v. GEORGE W. AVERY et als.

Plaintiffs, judgment creditors of Canale, caused their execution to be levied on certain movables. Mora enjoined the sale, claiming to be the owner of the property seized. The injunction was dissolved in the court below, and the judgment was affirmed in this court with twenty per cent. damages against the principal and surety *in solido*. Pending the appeal, the sheriff improperly released the seizure, and Mora sold the property at auction.

Plaintiffs bring this suit for damages resulting from the illegal release of the seizure by the sheriff and from the improper injunction by Mora, and pray judgment against them *in solido* for the amount of their judgment against Canale, which they failed to realize by reason of the illegal acts of the sheriff and Mora. The sheriff calls in warranty Mora and the sureties on his injunction bond.

It is not possible to discover what obligation Mora and his surety have contracted towards the plaintiffs. This suit is not on the injunction bond. The injunction was dissolved, and with damages granted to plaintiffs against the principal and surety *in solido*. The illegal release by the sheriff accrued subsequently to the injunction, and did not result necessarily from the exercise of that writ. That Mora disposed of a judgment debtor's property, after it had been released from seizure, did not create a legal obligation against him in favor of the judgment creditor of the party whose property he had disposed of.

There is also no legal obligation to be enforced under the call in warranty. The principal and surety on the injunction bond did not contract to warrant the sheriff against the consequences of his own illegal acts.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for plaintiffs and appellees. *Sambola & Ducros*, for Mora and his surety, defendants and appellants. *William R. Whitaker*, for Avery, the sheriff.

WYLY, J. The plaintiffs, judgment creditors of Joseph Canale for \$941 85, caused their execution to be levied on the stock and movables contained in store No. 50 Royal street; thereupon Juan Garcia y Mora enjoined the sale, claiming to be the owner of the property seized. The injunction was dissolved, and on appeal the judgment was affirmed

by this court with twenty per cent. damages *in solido* against the principal and surety on the injunction bond. 22 An. 417. In the meantime, that is, pending the injunction, Avery, the sheriff, improperly released the seizure, and Mora sold the property at auction.

After the decision of this court, the plaintiffs instructed the sheriff to proceed with the sale of the property which had been improperly enjoined by Mora.

Finding, however, that the sheriff had improperly released the seizure of the property, which was sufficient to pay their debt, and that Canale had disappeared without leaving any property to be seized under execution, the plaintiffs brought this suit for damages resulting from the illegal release of the seizure by the sheriff and from the improper injunction by Mora, and prayed judgment against them *in solido* for the amount of their judgment against Canale, \$941 85, which sum they failed to realize by reason of the illegal acts of said Avery, sheriff, and Mora.

Avery called in warranty Mora and the surety on his injunction bond, Jose Garcia y Boros. The court gave judgment for the amount claimed against Avery and Mora, and also gave Avery judgment in warranty for like amount against Mora & Boros. From this judgment Mora & Boros have appealed. Avery did not appeal.

We fail to perceive any obligation existing between the appellants and the appellees. The suit is not on the injunction bond. The injunction was dissolved, and this court condemned the principal and the surety on that bond *in solido* to pay the plaintiffs twenty per cent. damages on the amount of the writ enjoined. 22 An. 417.

The immediate cause of the damage complained of was the illegal release of the seizure by the sheriff pending the injunction. For this loss the sheriff and the sureties on his bond might be held liable, because it resulted from a dereliction of duty by that officer. This illegal release was an event occurring subsequent to the injunction, and did not result necessarily from the exercise of that writ. Now, whether the property after the release was disposed of by Canale or Mora is immaterial. After the release it was Canale's property, and he might legally dispose of it or permit Mora to do so. That Mora disposed of a judgment debtor's property after it had been released from seizure, did not create a legal obligation against him in favor of the judgment creditor of the party whose property he had disposed of. Legal obligations do not arise in that way.

We also fail to perceive any legal obligation to be enforced under the call in warranty. The principal and surety on the injunction bond did not contract to warrant the sheriff against the consequences of his

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own illegal acts. The injunction in no manner compelled him to release the seizure of the property.

We think the judgment against the appellants should be reversed.

It is therefore ordered that the judgment of the plaintiffs against the defendant Mora and the judgment in warranty of the defendant Avery against Mora & Boros be annulled, and it is now ordered that there be judgment in favor of the appellants, appellees paying costs of appeal.

No. 3307.

BAKER B. PEGRAM v. JOHN B. COOPER.

On the trial of this case the defendant offered in evidence a written instrument to show the contract entered into between the parties, and proposed to prove by witnesses then present that the plaintiff had failed on his part to comply with the written agreement. The judge *a quo* erred in refusing to admit this evidence. It was incumbent upon the defendant, under the allegations of his answer, to prove the alleged failure of consideration, and he was entitled to the benefit of any legal evidence in his power to establish said allegations.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. H. H. Bryan, Jr.*, for plaintiff and appellee. *Case & Rouse*, for defendant and appellant.

TALIAFERRO, J. The defendant is sued on several promissory notes amounting to \$1000. The defendant pleaded failure of consideration. The plaintiff had judgment and defendant appealed.

A bill of exceptions taken by the defendant during the trial of the case in the court below will first be considered.

The plaintiff and defendant were formerly partners in business in New Orleans, under the name and style of John B. Cooper & Co. It seems that their business was to attend upon the levee and landing, to receiving cargoes of merchandise of various kinds for other merchants, and having the goods taken care of and delivered. It seems further that the plaintiff was the more prominent partner, and wielded a strong influence among their employes. Upon the dissolution of partnership a written instrument was signed in duplicate, by which it was agreed that in consideration for the plaintiff's interest in their partnership, and for the further consideration of the plaintiff's using his influence to retain and secure customers and patrons for the benefit of the defendant, who intended to follow the same business in which the partnership had been engaged, the defendant agreed to pay the sum for which the notes were executed.

On the trial of the case the defendant offered in evidence the written instrument to show the contract between the parties, and proposed to

prove by witnesses then present that the plaintiff had failed on his part to comply with the written agreement. The judge *a quo* refused to admit the evidence offered, and the defendant excepted and reserved a bill.

We think the evidence should have been admitted. It was incumbent upon the defendant, under the allegations of his answer, to prove the alleged failure of consideration, and he was entitled to the benefit of any legal evidence in his power to establish the allegation. The case must be remanded for that purpose.

It is therefore ordered that the judgment appealed from be annulled and set aside. It is further ordered that this case be remanded to the court below with instructions to admit the evidence offered by the defendant, and further to be proceeded with according to law, the plaintiff and appellee paying costs of this appeal.

Rehearing refused.

No. 4892.

GABRIELLE CORREJOLLES v. SUCCESSION OF LOUIS FOUCHER.

The only question presented in this suit was decided in the case of *Marquez v. the city of New Orleans*, 13 An. 320. The court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the proprietors on the north side. That case and the one at bar seem to be identical.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Alfred Philips*, for plaintiff and appellant. *E. Bermudes*, for defendant and appellee.

TALIAFERRO, J. On the third of February, 1869, the plaintiff entered into a contract with the police jury of the parish of Jefferson, left bank, to build a shell road on Nayades street (now St. Charles street), from the upper boundary of the city of Carrollton, on the north side of that street, for a fixed price. This contract was entered into under the authority of an act of the Legislature passed in 1868, authorizing the police jury of the parish of Jefferson to order the making of a shell road, or Nicolson pavement. The work having been performed by the contractor, the bills against the various owners of property fronting on the street, were made out by the proper parish officers and delivered to the contractor for collection.

Among the proprietors owning property on this street was the late Louis Foucher, Marquis de Circé. His property is situated on the south side of St. Charles street and the shell road, as we have seen, was constructed on the north side of that street. The payment of the

Correjolle v. Succession of Foucher.

plaintiff's bill is resisted on the plea that the middle ground of the street, which is used by the New Orleans and Carrollton Railroad Company as a train way, is either the property of the railroad or of the public, and, in either case, is bound to sustain its portion of the expense of shelling the road. The defendant denies that his lands, lying south of the street, are bound for any part of the taxes. He further contends that the act of the Legislature of 1868, authorizing the making of a shell road, is unconstitutional for the reason that the second object of the act is not expressed in its title.

Judgment was rendered for the defendant and the plaintiff has appealed.

It seems that the only question in which the defendant is concerned, presented in this case, was decided in the case of *Marquez v. the city of New Orleans*, 13 An. 320. In that case the court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the proprietors on the north side. That case and the one at bar seem to be identical. With that view of the case the judge *a quo* decided in favor of the defendant, and we think correctly. The plea of the unconstitutionality of the law is without weight.

It is therefore ordered that the judgment of the district court be affirmed with costs.

No. 5051.

T. A. DAHLGREEN v. STEPHEN DUNCAN et als.

The possessory action is not the mode to test the right to enforce a mortgage or the regularity and validity of the proceedings in the execution of judgments. To recognize the action of plaintiff in this instance would give to every third possessor of mortgaged property the right to obtain and hold possession of such property against and in despite of the legal proceedings by the mortgage creditor to enforce his claim.

The law has provided the remedy for the protection of the rights of a third possessor, but it is not the possessory action.

APPEAL from the Thirteenth Judicial District Court, parish of Texas. *Hough, J. Samuel R. & O. L. Walker* and *Drake & Garrett*, for plaintiff and appellee. *William B. Spencer* and *T. P. Farrar*, for defendants and appellants.

HOWELL, J. This is a possessory action, based on the allegations that plaintiff had been in possession, as owner, of a certain plantation for more than a year, when the sheriff of the parish, by virtue of six writs of seizure and sale, issued by defendants on judgments obtained

Dahlgreen v. Duncan et al.

by them against Charles G. Dahlgreen, disturbed his possession by seizing said plantation, advertising, and selling it to the defendants.

One of the grounds of the defense is, that whatever possession the plaintiff had was legally terminated and ended by the seizure and sale of the property, under the precedent and superior rights of the defendants, and that the seizure and sale under defendants' mortgage, which contained the pact *de non alienando*, was not a disturbance under the law, and gave no right to the possessory action.

This position seems to us to be correct in law. The possessory action is not the mode to test the right to enforce a mortgage or the regularity and validity of the proceedings in the execution of judgments. To recognize this action of the plaintiff, would give to every third possessor of mortgage property the right to obtain and hold possession of such property against, and in despite of, the legal proceedings by the mortgage creditor to enforce his claim. The law has provided the remedy for the protection of the rights of a third possessor, but it is not the possessory action.

It is therefore ordered that, the judgment appealed from be reversed and that the demand of the plaintiff be rejected with costs in both courts.

No. 3268.

THE WIDOW AND HEIRS OF JEAN PARDO v. A. A. PARDO.

The widow and heirs of Jean Pardo claim a house and lot, formerly belonging to A. A. Pardo, on which the deceased had a mortgage, and which, in 1858, he bought at an auction sale ordered by the Second District Court under insolvent proceedings in consequence of the bankruptcy of A. A. Pardo, the defendant in this case, who was, however, permitted by the purchaser to retain possession of the property.

The defense set up that the price paid for the property was money which the deceased was owing to defendant, is utterly without foundation.

The defendant, in the face of the schedule which he filed in bankruptcy as syndic of his creditors, and which is verified by his own oath, can not be heard setting up an account against his brother extending back to 1840, eighteen years previous to his insolvency and which is not mentioned in the schedule. He is estopped from denying the truth of his oaths and judicial admissions in the insolvent proceedings.

If the account aforesaid was a valid claim, it should have been put on the schedule as an asset of the insolvent. If he colluded with his brother in suppressing this claim and allowing him to carry off the property as first mortgage creditor, this court will not aid him in seeking to derive a benefit from the fraud.

A PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Hays & New*, for plaintiffs and appellees. *Armand Pitot and E. Bermudez*, for defendant and appellant.

WYLY, J. In March, 1858, A. A. Pardo mortgaged his house and lot on Royal street to his brother, Jean Pardo, for \$6145 72.

In September following, A. A. Pardo filed his petition for the sur-

The Widow and Heirs of Pardo v. Pardo.

render of his property under the insolvent laws in the Second District Court, placing on the schedule, verified by his oath, this debt due his brother for \$6145 72.

On twenty-seventh November, 1858, the property upon which Jean Pardo had a mortgage was sold by order of the Second District Court under the insolvent proceedings, and he became the purchaser for the price of \$5600.

In February, 1859, the account of A. A. Pardo, syndic of his creditors, was homologated by the Second District Court. On this account he placed Jean Pardo as first mortgage creditor, entitled to receive assets amounting to \$5079 15. After the death of Jean Pardo, his widow and heirs brought this suit for the property acquired by him at the adjudication under the insolvent proceedings, A. A. Pardo having retained possession since said sale. The answer admits the purchase in the name of Jean Pardo, but avers that said purchase was made for the benefit of defendant, and that the price was paid by the money which the deceased became indebted for to the defendant, and that the title was to be transferred to him upon settlement of their affairs. The defendant sets up, as the basis of an equitable demand against his deceased brother, Jean Pardo, a claim of \$25,000, consisting mainly of items or charges for the board and lodging of various members of his brother's family during a period of over a quarter of a century. He alleges he did not as a merchant keep an account current with his brother, and if he had not become poor after helping his brother to a better fortune, he might not and he would not have demanded settlement; but being obliged to go into insolvency, although he did not consider his brother as a regular debtor, whose account was to be surrendered, he expected his brother, as he had helped him out before and entertained his family for so many years, to do something for his (defendant's) minor children, by purchasing the property in which he lived and passing the title to him afterwards.

Respondent further alleges that his account against Jean Pardo was prescribed as far as creditors could be interested therein, but the debt was a just one, exceeding by thousands of dollars the paltry price of \$4600 paid for the house, and it was an act of justice that the deceased should do for his brother, in a small proportion, what that brother had done for him.

The court gave judgment for the plaintiffs, and the defendant appeals.

In this case we see no legal ground upon which the defendant can succeed. He is estopped from denying the truth of his oaths and judicial admissions in the insolvent proceedings. He can not be heard to deny that his brother was his mortgage creditor for \$6145.72, and

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that the consideration of the purchase of the property in controversy was part of the sum accorded by him as syndic to Jean Pardo as first mortgage creditor.

The defense, then, that the price paid for the property was money which the deceased was owing the defendant, is utterly without foundation. In the face of the schedule filed by the defendant and verified by his oath, he can not be heard setting up an account against his brother extending back to 1840, eighteen years prior to his insolvency. If that account was a valid claim it should have been put on the schedule as an asset of the insolvent. If he colluded with his brother in suppressing this claim and allowing him to carry off the property as first mortgage creditor, this court will not aid him in seeking to derive a benefit from the fraud.

The defense is utterly without merit.

Judgment affirmed.

No. 5095.

JOHN GORDON, Administrator, v. FAHRENBERG & PENN.

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104 791

Where, in a contest for the ownership of lands, proof was admitted as secondary evidence, the destruction of the primary evidence being shown, and the court *a qua* held that the objections went rather to the effect than to the admissibility, the ruling was correct.

The evidence, however, fails to identify sufficiently the land in dispute as the land embraced in the destroyed deed, but in the capacity of one of the heirs of John Ruth, who, it is admitted, entered the land at the Land Office at Monroe, John K. Ruth, or his succession, represented by the plaintiff, can maintain this petitory action against the defendants who are possessors without title.

The constructions made by Penn, one of the defendants, being partly on plaintiff's land and partly on defendant's, plaintiff can not keep them by paying defendant the costs of construction, pursuant to article 508 of the Revised Code, because the building is not entirely on plaintiff's soil. The defendant is not entitled to a judgment in reconvention for the value of his constructions, but must be allowed to remove that part of them erected by him and resting on the soil of the plaintiff.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Kennard, Howe & Prentiss, H. R. Steele, Drake & Garrett* and *Reeves Lewis*, for plaintiff and appellee. *L. V. Reeves* and *W. B. Spencer*, for defendants and appellants.

WYLY, J. The defendants in this petitory action appeal from the judgment decreeing the plaintiff, the administrator of the succession of John K. Ruth, to be the owner of the four hundred and fifty-six acres of land described in the petition, together with a sawmill, engine and fifty thousand feet of lumber, subject however to D. B. Penn's reconventional demand for improvements to the extent of \$1500, which is to be paid before eviction.

It is proved that John K. Ruth had a deed from his father, John Ruth, for some four or five hundred acres back of the Blackwater plan-

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tation owned by the defendant, D. B. Penn, and that this deed was destroyed by fire. No advertisement of the destruction of this deed was necessary in order that the plaintiff might prove its contents. *Beebe v. McNeil*, 8 An 130. See also 15 An. 463.

The defendants objected to the evidence of Mrs. Fenwick in regard to the destroyed deed, on the ground that on being preliminarily cross-examined by them she stated that she did not recollect the date of the deed nor the price or terms, nor the description of the lands as embraced in said deed. They further objected to the question asked said witness, whether said deed purported to be an absolute conveyance of said property. They also objected to the question propounded to Mrs. Margaret S. Ruth, whether John K. Ruth had a title to the land in controversy. The defendants further objected to the introduction of the inventory of the succession of John K. Ruth on the ground that it was made only a short time before the institution of this suit, and that it was only in fact the declarations of the notary on the statements of others. All this proof was admitted as secondary evidence, the destruction of the primary evidence being shown; and the court held that the objections went rather to the effect than to the admissibility of said evidence. We think the ruling of the court was correct.

The land in controversy was entered at the land office by John Ruth, the father of John K. Ruth, who died before his son. That he conveyed to John K. Ruth four hundred and fifty-six acres back of the Blackwater plantation, there is no doubt. But the evidence fails to identify sufficiently the land in dispute as the land embraced in the destroyed deed. As one of the heirs, however, of John Ruth, who, it is admitted, entered the land at the land office at Monroe, John K. Ruth or his succession, represented by the plaintiff, can maintain this petitory action against the defendants, who are possessors without title, the title set up by D. B. Penn not embracing the land in controversy. "As against a mere possessor without title, a joint heir or a joint owner can maintain a petitory action." *Compton v. Mathews*, 3 La. 128.

The judgment for the land in favor of plaintiff is correct. There is error, however, in regard to the fifty thousand feet of lumber. Plaintiff shows no title to this; nor does he show that the timber out of which it was sawed was cut from the land in controversy. There is also error in regard to the judgment for \$1500 in reconvention for the value of improvements constructed by the defendant, D. B. Penn. The sawmill was not constructed entirely on the soil of the plaintiff; it is partly on the land of the plaintiff and partly on the land of the defendant, D. B. Penn. Therefore the plaintiff can not keep the sawmill and fixtures by paying the defendant the costs of construction,

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pursuant to article 508 of the Revised Code, because the construction is not entirely on plaintiff's soil.

There being no express law applicable to a case like this, we think it equitable (Revised Code, article 21), to allow the defendant, D. B. Penn, to remove that part of the construction erected by him resting on the soil of the plaintiff.

It is therefore ordered that the judgment herein be amended by striking out that part decreeing the plaintiff the owner of the fifty thousand feet of lumber, and also by striking out the judgment in reconvention, reserving to the defendant, D. B. Penn, the right to remove that part of the sawmill and appurtenances constructed by him, resting on the soil of the plaintiff, and as thus amended it is ordered that the judgment be affirmed, appellee paying costs of appeal.

No. 3355 and 3088.

PATRICK HIGGINS v. C. C. HALEY.

The plaintiff moved for a new trial in the court below on the ground that, during the recess of the court, the jury was illegally and improperly influenced by the defendant and his accomplices to render a verdict in favor of said defendant, notwithstanding the judge had warned the jury that they were to hold no conversation with any person upon the merits of the case before them. On the trial of this motion, plaintiff attempted to prove his allegations by witnesses, which he was not permitted to do. The judge *a quo* erred in refusing to hear the testimony offered.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* Jury trial. *Hays & New*, for plaintiff and appellant. *H. O. Miller* and *John Livingston*, for defendant and appellee.

MORGAN, J. These two different records form in reality but one case. Plaintiff moved the court for a new trial on the ground that on the day of trial, after the court had adjourned at three o'clock to meet at six o'clock of the same day, notwithstanding the judge warned the jury that they were to hold no conversation with any person upon the merits of the case before them, a portion of the jury did hold conversation with the defendant, and with his agents and instruments upon the merits of the cause, and were illegally and improperly influenced by the defendant and his agents and accomplices to render a verdict in favor of the defendant; that improper influences were brought to bear upon the jury, or a portion thereof, during the said recess; and he swore that he had received this information from one Daniel Haley; all of which he offered to prove by witnesses, and all of which he was prohibited from doing by the court.

The judge erred. His admonitions were to be obeyed. If it was a fact that the jury were guilty of misconduct, and that their verdict

Higgins v. Haley.

was improperly obtained, it should have been set aside, and this was a fact which the plaintiff had a right to establish by evidence.

It is therefore ordered, adjudged and decreed that the judgments in these consolidated cases be avoided, annulled and reversed, and that they be remanded to be tried *de novo*, appellees to pay costs of appeal.

ON REHEARING.

MORGAN, J. In our former judgment we ordered the case to be remanded to be tried *de novo*. This was wrong.

Plaintiff in the court below moved for a new trial on the ground that the jury had been improperly influenced. On the trial of his motion he offered to prove the fact alleged by witnesses. The court refused to hear them, and he reserved his bill. The district judge erred. Plaintiff should have been heard. As the case now stands before us, we can only pass upon the correctness of the ruling of the judge with regard to his refusal to hear testimony as to the improper conduct of the jury.

It is therefore ordered, adjudged and decreed that our former judgment be set aside; and it is further ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed and the case remanded, and that the district judge be instructed to hear the testimony offered by plaintiff on his motion for a new trial, the costs of appeal to be paid by defendant.

No. 3285.

WILLIAM J. TAYLOR v. KEHLOR, UPDIKE & CO.

This case originating in the dismissal of the employe by the employer is governed by art. 2749 of the Civil Code.

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52 2109

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Gilmore & Sons*, for plaintiff and appellant. *J. W. Thomas*, for defendants and appellees.

MORGAN, J. Defendants made a contract in writing by which they employed the plaintiff for one year to act as their salesman, the engagement to commence from the first of August, 1869. After a few months' service the plaintiff was discharged, and without cause. His case is governed by the art. 2749 of the Civil Code. See the case of *Budinski v. Bidwell et als.*, just decided.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the plaintiff have and recover judgment against the defendants for sixteen hundred dollars, with legal interest from judicial demand, and costs of both courts, with privilege upon the property attached.

No. 5149.

MRS. A. G. O'HARA, Natural Tutrix, v. J. N. FOLWELL.

The proceeding sought to be enjoined in this case was predicated on the mortgage note of Joseph O'Hara, deceased, and in order to make a valid sale of the mortgaged property, the legal representative of his succession should have been made a party to said proceeding.

Notices served upon the plaintiff before she was confirmed as natural tutrix, and as such administering said succession, were not sufficient. The proceeding taken against her before her appointment, was in no sense a proceeding had contradictorily with the succession of O'Hara, the mortgage debtor.

This court can not assent to the proposition set up in defense, that the notices were sufficient, because subsequently to the mortgage, O'Hara donated the mortgaged property to the plaintiff, his wife, and that the succession of O'Hara, having no interest in the mortgaged property, was not a necessary party.

The proceeding was on the mortgage note of O'Hara, and therefore the legal representative of his succession was a necessary party to any suit or other proceeding on that note.

Besides, if it were true that the property passed into third hands subsequently to the mortgage, no proceeding by executory process could be had, because in the act of mortgage there was not the *non alienando* clause.

The plaintiff, however, can not disavow her judicial averment that the mortgaged property belongs to the succession of her deceased husband.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. R. C. Elliott*, for plaintiff and appellant. *Edward Phillips*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment dissolving her injunction restraining the executory proceedings sued out by the defendant J. N. Folwell on the mortgage note of \$550, made by Joseph O'Hara, deceased.

The ground for the injunction is, there was no sufficient notice of the order of seizure and sale, nor notice of seizure; because at the time the said notices were served upon her, she had not yet qualified as natural tutrix, and as such administering the succession of Joseph O'Hara.

The notice of the granting of the order of seizure and sale was served on ninth September, 1873, and the notice of seizure of the mortgaged property was served on thirteenth of said month. Plaintiff was not confirmed as natural tutrix till fifteenth January, 1874.

The proceeding was on the mortgage note of Joseph O'Hara, deceased, and in order to make a valid sale of the mortgaged property, the legal representative of his succession should have been made a party to said proceeding. Notices served upon the plaintiff before she was confirmed as natural tutrix, and as such administering said succession, were not sufficient. The proceeding taken against her before her appointment was in no sense a proceeding had contradictorily with the succession of O'Hara, the mortgage debtor.

The defendant, Folwell, however, contends that the notices were sufficient, because subsequent to the mortgage O'Hara donated the

O'Hara v. Folwell.

mortgaged property to the plaintiff, Mrs. O'Hara, his wife, and the succession of O'Hara having no interest in the mortgaged property, was not a necessary party. To this proposition we can not assent. The proceeding was on the mortgage note of O'Hara, and the legal representative of his succession was a necessary party to any suit or other proceeding on that note. Besides, if it be true the property passed into third hands subsequent to the mortgage, no proceeding by executory process can be had, because in the act of mortgage there is not the *non alienando* clause. The plaintiff, however, can not disavow her judicial averment that the mortgaged property belongs to the succession of her deceased husband.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that the injunction herein be perpetuated, with costs of both courts.

26	371
118	183

No. 2978.

WILLIAM O'HERN v. A. B. GOULDY et als.

Where the parties who claimed liens under the law granting a privilege to mechanics being cited, to enable them to establish their claims and receive their *pro rata* of the amount deposited, appeared and contested with the plaintiff, it matters not whether some of the parties received a judgment for the whole of their claims or not. An appeal will lie from the judgment.

The plaintiff employed defendant to construct a house for him according to contract. Defendant, before completing the work abandoned it and left the State. Having put defendant in *mora*, plaintiff employed other workmen to complete the job at the expense of defendant. There are various claims by material men for materials furnished to the contractor and used in erecting plaintiff's building, who has instituted this action to avoid a multiplicity of suits and bring together the various claimants *in concursu* for the purpose of having their rights and privileges adjusted, and to have the sum of \$527. deposited by him in court distributed *pro rata* among the several parties—said amount being the balance due, as he represents, to the defendant under the contract, and which should go *pro rata* towards paying the material men their claims, for which he alleges that defendant is bound.

This court is satisfied that the claims of certain of the material men in whose favor judgment was given against O'Hern personally, were debts contracted by Gouldy, against whom the bills were made out; that credit was given for the materials to the contractor Gouldy, and not to O'Hern, the owner of the lot. Therefore the alleged promise of plaintiff to pay these claims can not be proved by parol. There is no ground for a personal judgment against the plaintiff for the amount of those claims.

A PPEAL from the Seventh District Court, parish of Orleans. *Oollens, J. Cotton & Levy*, for plaintiff and appellant. *O. T. Hufft, H. D. Ogden, C. E. Schmidt, Randolph, Singleton & Browne*, for appellees.

ON MOTION TO DISMISS.

LUDELING, C. J. In January, 1868, W. O'Hern employed A. B. Gouldy to erect a frame house for him. Gouldy commenced the building and worked until the second installment was paid when he abandoned

O'Hern v. Gouldy et als.

the work. O'Hern, having put him in default, completed the building. O'Hern then deposited in court \$527, which he alleged was the balance due on the contract with Gouldy, and he cited the parties, who claimed liens under the law granting a privilege to mechanics, to enable them to establish their claims and receive their *pro rata* of the amount deposited. The parties cited appeared and contested with O'Hern, and it matters not whether some of the parties received a judgment for the whole of their claims or not, an appeal will lie from the judgment. 16 An. 252; 15 An. 662; 13 An. 592.

The motion to dismiss is refused.

ON THE MERITS.

TALIAFERRO, J. The plaintiff in January, 1868, engaged the defendant, a builder, to construct a house for him on Camp street, in New Orleans, according to a plan and specifications set forth in a written contract. Defendant, however, before completing the work abandoned it and left the State. The plaintiff having put him *in mora* employed other workmen to complete the job at the expense of defendant. Various suits were instituted against the plaintiff in the Third District Court by material men for material of various kinds furnished by them and used in erecting the plaintiff's building.

The plaintiff it seems instituted this action in the Seventh District Court, as his petition declares, in order to avoid a multiplicity of suits and bring the various claimants into *a concursu*, for the purpose of having their rights and privileges adjusted, and to have the sum of \$527, deposited by him in court, distributed *pro rata* among these several parties, that amount being, as he represented, the balance due by him to the defendant Gouldy under the contract, and which should go *pro tanto* towards paying the material men their claims, for which he alleged Gouldy was bound. An order was rendered making the transfer of the various suits from the Third to the Second District Court, and citations were issued to the several parties thus made defendants, who filed separate answers, some averring that the plaintiff himself was bound to them under special agreements; others that the plaintiff and defendant were bound to them *in solido*, and others claimed only privileges on the fund deposited.

A mass of testimony was taken from which the district judge was satisfied that three of the defendants, viz: Mason & Co., F. Zimmerman and G. W. Lyman, had made good their allegations that the plaintiff had bound himself specially for their debts. Judgment was accordingly rendered in their favor, decreeing that the plaintiff should

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pay, respectively to Mason & Co. \$525 81, with legal interest from the twenty-fifth April, 1868; to Zimmerman \$109, with like interest from the same time; and to Lyman \$238, with like interest from the same time. The sum deposited by plaintiff was distributed among the other defendants on the basis of twenty-five per cent. of their respective claims. From this judgment the plaintiff appealed.

We think there is error in the judgment. The creditors, to whom it is shown that O'Hern is personally bound, should have been first required to participate *pro rata* with all the other parties in the fund presented by O'Hern, as the sum owing by him to Gouldy, and to have had judgment against O'Hern for the remainder. The judgment must be corrected in this respect.

It is therefore ordered that in so far as the judgment decrees that the several creditors—Mason & Co., Zimmerman and Lyman—shall recover the entire amount of their respective claims from O'Hern, be annulled, avoided and set aside; and it is now ordered that said creditors be required first to participate *pro rata* with all the other creditors whose names and the amount of whose claims respectively are set forth in the judgment of the lower court, in the aforesaid fund, on the basis of twenty-five per cent. of their respective claims as fixed by the said judgment, and that they have each judgment personally against O'Hern for the remainder of their claims respectively, with interest on those remainders as specified in the judgment of the lower court.

It is further ordered that the said Mason & Co., Zimmerman and Lyman shall pay out of their respective shares, to be received on the *pro rata* distribution, the costs of clerk and sheriff for petition and citation and service thereof, in like manner as ordered by the lower court against the other creditors; the said plaintiff, O'Hern, to pay the costs of suit, except those herein above mentioned and referred to; and as thus modified that the judgment of the district court be affirmed, the appellees paying costs of this appeal.

ON REHEARING.

WYLY, J. On further examination of the evidence in this case we are satisfied that the claim set up by Mason & Co., Zimmerman, Lyman and Covington, are debts contracted by Gouldy, against whom the bills were made out; that credit for the materials was given to the contractor Gouldy, and not to O'Hern, the owner of the lot upon which the building was to be erected. Finding, therefore, that the debts set up were owing by Gouldy, the promise of plaintiff to pay them can not be proved by parol. *Merz v. Labuzan*, 23 An. 747; *Levy & Dieter v. DuBois*, 24 An. 309; *Thompson & Barnes v. Pagaud*, lately

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decided. There is no ground, therefore, for a personal judgment against the plaintiff for the amount of these claims.

It is therefore ordered that the judgment of this court, rendered in this case on the fifteenth December, 1873, be amended so as to annul entirely that part of the judgment appealed from, decreeing a personal judgment against the plaintiff in favor of Mason & Co., Zimmerman, Lyman and Covington, and as thus amended it is ordered that our former decree herein remain undisturbed.

No. 4808.

STATE ex rel. P. P. CARROLL v. PHILOGENE JORDA.

The peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act under which this suit is brought is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873, is not well taken.

There is no conflict between the essential provisions of the two acts; the only points of difference are that the later act is of a less general application and the proceedings under it of a more summary character. According to the return of both Returning Boards for the election held in November, 1872, the defendant was defeated. It is clear that the defense is without merit.

A PPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. McKay*, District Attorney, for plaintiff and appellee. *Sambola & Ducros*, for defendant and appellant.

TALIAFERRO, J. This is a suit brought under the intrusion act on the relation of Carroll, who claims to have been duly elected parish judge of the parish of St. Bernard, at the general election held in November, 1872, and in pursuance thereof to have been duly commissioned to hold that office by Acting Governor P. B. S. Pinchback, whose commission he introduces in evidence. He complains that the defendant, Jorda, has intruded himself into and unlawfully holds and illegally exercises the functions of that office. He prays that Jorda be decreed accordingly an usurper and intruder into the said office, and that the plaintiff be decreed the legal parish judge of the parish of St. Bernard.

The defendant denies generally the allegations of the petition, and avers that he was duly elected to the office in controversy on the fourth of November, 1872, although the Board of Returning Officers of the State, by their proclamation of the twenty-fifth of December, 1872, have declared the said Carroll to be the successful candidate. He introduces in evidence a commission issued to him by H. C. Warmoth on the fourth of November, 1872, and his oath of office as parish judge taken on the second day of December following. He also adduces in evidence a suit instituted by himself on the fourteenth of November, 1872, contesting the right of A. G. Thornton to the office of parish

State ex rel. P. P. Carroll v. Jorda.

judge of the aforesaid parish, alleging that "it was rumored and pretended that A. G. Thornton was the successful candidate with a majority of three votes over him."

In this court the defendant has filed a peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act, under which this suit is brought, is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873. We think the exception is not well taken. We perceive no confliction between the essential provisions of the two acts; the only points of difference are that the later act is of less general application and the proceedings under it of a more summary character.

It is clear that the defense is without merit. The commission issued to the defendant by Governor Warmoth on the fourth day of November, 1872, before the returns of the general election were made as required by law, before a commission could legally be issued, was a nullity, and conferred upon the defendant no right to the office. The plaintiff holds the legal commission and the lower court properly rendered its decree in his favor.

It may be noticed that according to the report of both the Returning Boards, the defendant was defeated in the election; the one returning Thornton and the other Carroll, the plaintiff.

Judgment affirmed.

No. 5110.

26	375
45	78

F. S. GARNER, Administrator, v. WATSON M. GAY and Sheriff.

Art. 2446 of the Revised Civil Code provides that a contract of sale between husband and wife can take place only in the three cases which it mentions.

In this instance, the husband and wife had no right to contract in the manner attempted, and the mortgage sought to be enforced by executory process is utterly void.

The defendant erroneously contends that, as a third holder before the mortgage paper, resulting from this illegal contract, became due, he is not affected by said nullity.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper governed by the rule invoked by defendant.

A PPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. Montgomery & Delony*, for plaintiff and appellant. *Sparrow & Montgomery*, for defendant and appellee.

WYLY, J. The plaintiff, the administrator of the succession of Warren M. Benton, enjoins the executory proceeding sued out by the defendant on two mortgage notes executed by the deceased for \$4713 each, on the ground that said notes and mortgage were executed for

the benefit of Mrs. Mary Hughes, wife of said Benton, during the marriage, and they are void because the law prohibits the husband and wife from making contracts of this kind.

The court gave judgment for the defendant dissolving the injunction and ordering the executory process to proceed. The plaintiff appeals.

It appears that in 1867 Mrs. Benton obtained judgment against her husband, Warren M. Benton, for \$9426, with recognition of a tacit mortgage on his property, and also a decree of separation of property. Execution issued on this judgment, and Mrs. Benton bought the greater part of the property of her husband.

Subsequently, to wit: in March 1871, she and her husband entered into a contract whereby she agreed to convey all the property acquired under said judgment to her husband in consideration of the notes and mortgage now sought to be enforced. Article 2446 of the Revised Code provides that—"A contract of sale between husband and wife, can take place only in the three following cases :

First—When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

Second—When the transfer made by the husband to his wife, even though not separated—has a legitimate cause, as the replacing of her dotal or other effects alienated.

Third—When the wife makes a transfer of property to her husband in payment of a sum promised to him as a dowery ; saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage."

We think it is evident that Mrs. Mary Benton and her husband had no right to contract in the manner attempted in this instance, and that the mortgage sought to be enforced by executory process is utterly void.

The defendant, however, contends that as a third holder before due of this mortgage paper, he is not affected by the nullity complained of.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably, with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper, governed by the rule invoked by the defendant.

It is therefore ordered, that the judgment appealed from be annulled, and it is now ordered, that the injunction herein be perpetuated and that the defendant pay costs of both courts. See *Spurlock v. Mainer*, 1 An. 302; *Heyden v. Nutt*, 4 An. 65.

State of Louisiana v. Carro.

No. 4032.

26 377
47 1590

STATE OF LOUISIANA v. FRANK CARRO.

The objection that the proceeding by information against the defendant was illegal on the ground that it was violative of the fifth article of the Constitution of the United States which declares—"That no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," is not well taken. The provisions of the Constitution of the United States in relation to trials by jury apply only to the Federal courts.

The charge in the indictment that the defendant did feloniously and violently seize, take and carry away, etc., "the sum of one hundred dollars in paper currency of the United States of America, of the goods, property and chattels of," etc., is sufficient. It is a substantial compliance with the provisions of the statute. Revised Statutes, section 1061.

The objection that the name of one C. R. Schaffer is indorsed on the verdict as foreman of the jury, when it does not appear elsewhere that a man of that name served upon the jury, is without weight. The name of C. A. Schaffer appears on the list of jurors who sat on the trial. The discrepancy in the letter of the middle name is clearly a clerical error.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *Simeon Belden*, for the State. *A. G. Semmes*, for defendant and appellant.

TALIAFERRO, J. The defendant appeals from a judgment sentencing him to four years imprisonment at hard labor in the penitentiary for the crime of robbery. The case came up on an assignment of errors. These are alleged to be :

First—Being tried upon an information filed by the District Attorney, on the charge of robbery, a crime deemed infamous in law, the proceeding against him was illegal in this, that it was violative of the fifth article of the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Second—The charge that defendant violently seized, took and carried away from the person of John Tujuque "the sum of one hundred dollars in paper currency of the United States of America, of the goods, property and chattels of the said John Tujuque," etc., is defective and void in this, that there is no averment of the value of the currency, because currency *per se* is not susceptible of larceny under the laws of Louisiana.

Third—The name of one "Chs. Schaffer" is indorsed upon the verdict as foreman of the jury, when it does not appear elsewhere that a man of that name served upon the jury.

I. The provisions of the Constitution of the United States relative to trials by jury applies only to the Federal courts. 2 Kent Com. p. 13.

II. The statute provides in such a case that "it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note, and such allegation, as far as regards the description of the property, shall be sustained by proof of

State of Louisiana v. Carro.

any amount of coin or any bank note," etc. The indictment charges that the defendant did feloniously and violently seize, take and carry away, etc., "the sum of one hundred dollars in paper currency of the United States of America, of the goods, property and chattels," etc. We think this a substantial compliance with the provisions of the statute. Revised Statutes, section 1061.

III. This objection is without weight. The indorsement is "C. R. Schaffer, foreman." That name appears upon the list of jurors impaneled to serve at the April term, 1872, the term at which the defendant was tried. The name, C. A. Schaffer, appears upon the list of jurors who sat upon the trial. The discrepancy in the letter of the middle name is clearly a clerical error.

It is ordered that the judgment of the court *a qua* be affirmed.

No. 4933.

NEW ORLEANS SUGAR SHED CO. v. H. H. HARRIS, Tax Collector.

The capital of the plaintiffs is invested in a sugar shed constructed in a *locus publicus*, pursuant to a contract with the city of New Orleans. They have two hundred and forty thousand dollars of capital invested in the enterprise; they employ this sum in administering the business of keeping a sugar shed on this *locus publicus*. Such an investment can not fairly be considered as an investment in real estate within the meaning of act No. 42 of the acts of 1871.

If the plaintiffs had invested their capital in and become owners of real estate to the amount thereof, it would be manifestly unjust to assess that property and at the same time to tax the sum so invested as capital stock.

Under the provisions of the act in question intended to exempt property from double taxation, no warrant whatever can be found in support of the pretensions of the plaintiffs in regard to an entire exemption of their property from taxation.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Semmes & Mott*, for plaintiff and appellant. *Henry O. Dibble*, for defendant and appellee.

WYLY, J. The plaintiffs appeal from the judgment dissolving their injunction restraining the defendant from collecting taxes from them, on the ground that their capital, \$240,000, is invested in real estate, and therefore can not be taxed as capital stock, pursuant to act No. 42 of the acts of 1871.

The capital of the plaintiffs is invested in a sugar shed constructed on a *locus publicus*, pursuant to the contract of the city with Fleitas, whose rights the plaintiffs have acquired. They have two hundred and forty thousand dollars of capital invested in the enterprise; they employ this sum in administering the business of keeping a sugar shed on this *locus publicus*. Such an investment can not fairly be considered as an investment in real estate within the meaning of the act No. 42 of

New Orleans Sugar Shed Company v. Harria, Tax Collector.

the acts of 1871. The obvious reason for the exemption announced in said act is, that capital invested in real estate is liable to taxation, and if it be also included in the assessment as capital stock, the incorporated company will be liable to double taxation on the same property. If the plaintiffs had invested their capital and become owners of real estate to the amount thereof, it would be manifestly unjust to assess that property and at the same time to tax the sum so invested as capital stock.

Under the provisions of the act in question, intended to exempt property from double taxation, we find no warrant whatever in support of the pretensions of the plaintiffs in regard to an entire exemption of their property from taxation.

Judgment affirmed.

No. 4943.

F. C. MAHAN v. E. B. BENTON.

The present case, like that of *Oglesby v. Helm* previously decided, is an injunction suit to restrain proceedings in relation to a sum amounting to just five hundred dollars. It is clear that this court has no jurisdiction.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. Cotton & Levy* for plaintiff and appellant. *Hays & New* for defendant and appellee.

ON MOTION TO DISMISS.

TALIAFERRO, J. The grounds for the motion are:

First—The record has not been filed within the time of extension granted by the court.

Second—Want of jurisdiction, the amount involved being only five hundred dollars.

This case is not distinguishable from that of *Oglesby v. Helm*, decided not long since by this court. 26 An. 61.

The present case, like that of *Oglesby v. Helm*, is an injunction suit to restrain proceedings in relation to a sum amounting to just five hundred dollars. It is clear this court has not jurisdiction.

It is ordered therefore that, this suit be dismissed at appellant's costs.

Rehearing refused.

No. 3112.

P. BRADLEY & Co. v. H. N. McCREA.

This case is like the one of P. Bradley & Co., which precedes and is governed by it.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Budd & Grover*, for plaintiffs and appellees. *Bentinck Egan*, for defendant and appellant.

WYLY, J. This case is like the one of P. Bradley v. Mrs. S. A. Woodruff et al., just decided, and for the reasons stated therein it is ordered that the judgment appealed from be annulled, and it is now ordered that the sequestration be set aside and the cause be dismissed at plaintiffs' costs in both courts. C. P. 162.

MORGAN, J. The facts in this case are, in my opinion, different from the one just decided. The suit was instituted on the seventeenth January, 1870. On the twenty-fourth sequestration issued. On hearing a rule to that end, the sequestration was set aside. Defendant excepted to the jurisdiction of the court on the ground that he is a resident of the parish of Plaquemines. This exception was maintained in so far as a personal judgment was asked for against him.

No appeal was taken from the judgment which set aside the sequestration. No appeal was taken from the judgment which dismissed the suit as regards the personal demand. There was then neither person nor property before the court, and no one, nor anything, against whom, or upon which, a judgment could be founded. The judgment was therefore improperly rendered.

Upon these grounds I concur in the decree.

No. 4928.

WIDOW ANATOLE VILLERE v. SUCCESSION OF HUGUES VILLERE.

It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

A PPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J. McCaleb*, for plaintiff and appellant. *E. G. Dugué*, for defendant and appellee.

TALIAFERRO, J. This suit is brought on a promissory note for \$10,866 66, with interest at eight per cent. per annum from June 5, 1865. The defense is prescription and illegal consideration. There was judgment for the defendant and the plaintiff has appealed.

The note bears date in 1851. There are three credits upon it. The first on the twenty-sixth of November, 1862; the second June 21, 1864;

Widow Anatole Villere v. Succession of Villere.

the third on the fifteenth October, 1868. Citation was served on the twenty-ninth of October of that year. An interval of more than ten years elapsed between the maturity of the note and the date of the first payment; between the date of the second credit, June 21, 1864, and that of the third, more than five years intervened. The question then is as to whether the credit which appears upon the note of the fifteenth of October, 1869, is of such a character as to take it out of prescription.

The defendant contends that the person who entered that credit was without authority to renounce or waive prescription that had already accrued. The credit it seems was entered by the tutor of Hugues Villere's minor children; and it is contended that this tutor, by virtue of his appointment as tutor became, *ipso facto*, administrator of their father's estate, and that he has acknowledged the debt in a petition filed in the parish court of Plaquemines. It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents. 21 An. 373; Ib. p. 748; 23 An. 193; 24 An. 83.

From the facts presented in this case we are unable to find that there has been any act done that legally bars the prescription of five years, and therefore conclude the judgment of the district court was properly rendered.

Judgment affirmed.

No. 3044.

JAMES LONGSTREET, v. R. MARSH DENMAN & Co.

The plaintiff claims the value of a carriage and harness he purchased from defendants and left with them on storage. He had paid a portion of the price in cash, and for the balance gave the defendants a note of J. B. Hood to the order of and indorsed by plaintiff which was taken as a payment of the bill for the carriage, and a receipt in full given. The note was not paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights, they had no authority to sell the plaintiff's property which was stored with them subject to his order.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. M. Bonner*, for plaintiff and appellee. *Foster & Merrick, Brice & Mitchel*, for defendants and appellants.

HOWELL, J. The defendants have appealed from a judgment against them for the value of a carriage and harness purchased by plaintiff from them and left with them on storage. The evidence satisfies us, as it did the judge *a quo*, that after the purchase of the carriage there was a settlement between the parties, by which the plaintiff paid a

portion of the price in cash and for the balance gave the defendants a note of J. B. Hood, to the order of and indorsed by plaintiff, which was taken as a payment of the bill for the carriage and a receipt in full given. The note was not paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights, they had no authority to sell the plaintiff's property, which was stored with them subject to his order; what occurred after the maturity of the note did not amount to a new agreement or obligation on the part of plaintiff, nor give the defendants the right to sell as they did.

Judgment affirmed.

No. 3470.

L. MCCARTHY v. G. BAZE et al. R. LLOYD, Third Opponent.

In this suit Lloyd has intervened and claimed the property seized. He had leased the office in which the movables were found to defendants. At the time of the lease some of the property seized was in the office. This property, belonging to Lloyd, was not subject to plaintiff's judgment, and the court *a quo* did not err in so deciding.

The balance of the property Lloyd claims under a bill of sale from the defendants, who, at the time of the sale, were in his debt for rent. The property, however, remained in the possession and under the control of the defendants. Lloyd alleges that it so remained with them as his agents. But there was no delivery, and this was essential. Therefore, on this point, the decision of the judge *a quo* against the intervenor is correct.

There was error, however, in condemning Lloyd to pay the costs. A portion of the property belonged to him. He enjoined the sale thereof. Judgment having been rendered in his favor for a part of the claim, the costs should have followed the judgment.

APPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. Albert Voorhies*, for plaintiff and appellee. *James Brewer*, for intervenor and appellant.

MORGAN, J. Plaintiff obtained judgment against the defendants. In execution thereof he seized certain movables found in their office. Lloyd intervened and claimed the property. He had leased the office in which the movables were found to defendants. At the time of the lease some of the property seized was in the office. It belonged to Lloyd. This property was not subject to the plaintiff's judgment, and the district court did not err in so deciding.

The balance of the property Lloyd claims under a bill of sale which he produces. At the time the sale was passed the defendants owed him only sixty dollars, and this for rent. The property remained in the possession and under the control of the defendants. Lloyd says it so remained with them as his agent, etc. But there was no delivery, and this was essential. The judgment of the district court upon this point was correct.

McCarthy v. Baze et al.

There was error, however, in condemning Lloyd to pay the costs. A portion of the property seized belonged to him. He enjoined the sale thereof. Judgment was rendered in his favor for a part of his claim. The costs should have followed the judgment.

It is therefore ordered, adjudged and decreed that in so far as the judgment of the district court condemns the intervenor and third opponent to pay the costs of the suit, it be avoided, annulled and reversed, and that in all other respects it be affirmed. Costs of appeal to be paid by plaintiff.

No. 5097.

STATE OF LOUISIANA v. WILLIAM L. BOWER.

26	383
46	627
26	383
49	356
26	383
50	1073

The point in this case is, that the judge erred in refusing a new trial on the showing made that one of the jurors was a British subject, and therefore incompetent to sit at the trial.

The record contains no mention of the reason of the judge for refusing the application for a new trial—whether because he found the fact not satisfactorily established, or whether, as a question of law, the defendant was not entitled to it—conceding the fact to be satisfactorily proved.

If the finding of the judge *a quo* was based on a question of fact, it can not be revised by this court, because, in criminal cases, only questions of law are cognizable by this tribunal. But assuming that the finding of the judge in refusing a new trial was upon a question of law, the conclusion of this court is that he was correct.

The defendant, duly served with a list of the jurors by whom it was proposed that he should be tried, had ample opportunity to consider any objection he might have to their capacity or competency, and he should have made whatever objections he had at the time each juror was offered.

In his affidavit for a new trial, the defendant states that he did not know the fact of which he complains till after the trial. If he neglected to ask the juror at the time he was offered whether he was a citizen or not, it was a neglect of which he can not now complain.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J.* Criminal case. *Henry O. Dibble*, Assistant Attorney General, for the State. *Ryan*, for defendant.

WYLY, J. The defendant, who was tried and convicted of horse stealing and sentenced to the penitentiary for three years, appeals from the judgment of the court below. There is no bill of exceptions nor assignment of errors.

The objection is that the judge erred in refusing a new trial on the showing made that one of the jurors was a British subject, and therefore incompetent to sit at the trial.

The record contains no mention of the reason of the judge for refusing the application for a new trial—whether because he found the fact not satisfactorily established, or whether, as a question of law the defendant was not entitled to it, conceding the fact to be satisfactorily proved.

If the finding of the judge was based on a question of fact, it can not be revised by this court, because in criminal cases only questions of law are cognizable by this tribunal. But assuming that the finding of the judge in refusing a new trial was upon a question of law, we are of the opinion that his conclusion was correct.

The defendant, duly served with a list of the jurors by whom it was proposed that he should be tried, had ample opportunity to consider any objection he might have to their capacity or competency, and he should have made whatever objections he had at the time each juror was offered. 13 An. 276.

In his affidavit for new trial, however, the defendant states he did not know the fact of which he complains till after the trial. If he neglected to ask the juror at the time he was offered, whether he was a citizen, it was a neglect of which he can not now complain.

Judgment affirmed.

No. 3545.

MRS. M. E. WINN v. J. F. SPEARING.

The defendant was not justified in refusing to pay rent to plaintiff, on the ground that the house he leased from her was not put in repair, according to contract. His remedy was to put his lessor in default and make the repairs, deducting the amount thereof. Under this view of the case, the ruling of the judge *a quo*, refusing to hear testimony as to the repairs that were necessary, was correct.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Besancon, Cotton & Levy*, for plaintiff and appellee. *J. H. Ferguson*, for defendant and appellant.

MORGAN, J. Plaintiff leased to the defendant a dwelling for ten months, commencing on December 1, 1870.

She brings this suit for nine months rent, and ten per cent., the agreed attorney's fees in case of suit.

The lease is admitted, but defendant claims that by his contract the house was to be put in good repair prior to the first of February following, which he says was not done.

We do not think him justified in occupying the house free of rent because it was not put in repair. His remedy was to put his lessor in default and make the repairs, deducting the amount thereof. Under this view of the case the ruling of the judge refusing to hear testimony as to the repairs that were necessary, was correct. The appeal was evidently taken for delay.

Judgment affirmed with ten per cent. damages for a frivolous appeal.

State of Louisiana ex rel. Raspberry v. Parish Judge of the Parish of Bossier.

No. 5204.

STATE OF LOUISIANA, ex rel. L. C. RASBERRY, v. PARISH JUDGE OF THE
PARISH OF BOSSIER.

Where the issue made by a rule to show cause was, whether a judgment rendered against the succession administered by the relator should be paid and satisfied out of the individual estate of the administrator, on the ground that the administrator refused or neglected to pay it out of the funds of the estate, and that he failed or refused to file an account of his administration; and where the decision was that execution issue against the individual property of the administrator, to be seized and sold to satisfy the judgment against the succession, it is clear that the right of appeal lies from such a decision.

APPPLICATION for a mandamus, directed to the parish judge of the parish of Bossier. *John Ray, Fort & McDonald*, for relator.

TALIAFERRO, J. The relator complains that he is refused an appeal from an order of the defendant making absolute a rule taken against the relator to show cause why execution should not issue against his own property, and that it be seized and sold to pay and satisfy a judgment rendered against him as administrator of the succession of L. F. Steele, in course of administration in the parish of Bossier.

The grounds stated by the respondent for refusing the appeal, we think, are insufficient. The issue made by the rule was, whether a judgment rendered against the succession administered by the relator should be paid and satisfied out of the individual estate of the administrator, on the ground that the administrator refused or neglected to pay it out of the funds of the estate, and failed or refused to file an account of his administration. The decision was that execution issue against the individual property of the administrator, and that it be seized and sold to satisfy the judgment against the succession. It is clear the respondent has the right to appeal.

It is therefore ordered that the rule be made absolute, and the respondent ordered to grant the appeal prayed for.

No. 3949.

WILLIAM J. MCLEAN v. A. FOSTER ELLIOT et als.

The jurisprudence of this State is settled upon the point of the slave consideration in contracts, and this court will not disturb it.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for plaintiff and appellee. *E. W. Huntington*, for defendants and appellants.

MORGAN, J. This case was remanded to take evidence upon, and fix the relative values of, the land and slaves, which were the consideration of the note sued on. The evidence shows that this proportion

McLean v. Elliot et als.

is \$444 81. The judgment of the lower court was for \$1350, with eight per cent. interest from twenty-seventh November, 1867.

Plaintiff presses upon us that what we now call the slave consideration in contracts should not be entertained; but the jurisprudence of the State, we think, is settled upon this point, and we will not disturb it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended so as to reduce the amount allowed to plaintiff from \$1350 to \$444 81, with eight per cent. interest thereon from twenty-seventh November, 1867, until paid; plaintiff to pay the costs of appeal.

No. 3432.

EDWARD MATTHEWS v. CRESCENT CITY MUTUAL INSURANCE COMPANY.

Plaintiff alleges that he is the owner of a certain insurance scrip of the Crescent Mutual Insurance Company and of certain dividends accrued thereon, which the defendants refuse to deliver to him. Defendants admit that they held such scrip and dividends, but aver that the same were garnisheed in their hands by one Hillman, a judgment creditor of plaintiff; that, subsequently, judgment was rendered in favor of Hillman against defendants, as garnishees, who have paid said scrip and dividends to said Hillman; and they therefore deny any liability to plaintiff.

There are two insurmountable difficulties in the way of the defense set up by respondents:

First—Plaintiff's assets or property in their hands was not seized by the garnishment process, because the *feri facias* was not in the sheriff's hands, when the interrogatories were answered; and the judgment against them in that proceeding was a consent judgment not binding on the plaintiff, nor in any manner divesting his title to the property in question.

Second—The judgment upon which the pretended garnishment process issued, was an absolute nullity, because there was no citation served on Matthews against whom it was rendered; and a seizure or sale under a judgment, void from want of a citation, neither confers a right nor divests a title.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Hornor & Benedict*, for plaintiff and appellee. *T. Hunton*, for defendant and appellant.

WYLY, J. Plaintiff alleges that he is the owner of certain insurance scrip of the Crescent Mutual Insurance Company, of the full value of six hundred and forty dollars and dividends accrued thereon to the sixth of July, 1868, viz: one hundred and ninety-two dollars, with interest; that he made due application to said insurance company for said scrip, dividends and interest, and they refuse to deliver the same to him, and that they have been duly placed in default therefor.

Issue was joined by defendants, who admitted that they held such scrip and dividends, but that the same were, on the sixth day of July, 1868, garnisheed in their hands by one Daniel Hillman, a judgment creditor of plaintiff in suit No. 17,817 of the docket of the late Fourth District Court of New Orleans; that subsequently judgment was ren-

Matthews v. Crescent City Mutual Insurance Company.

dered in favor of said Hillman against respondent, said insurance company, as garnishee, and that thereunder they have paid the said scrip and dividend to said Hillman, and they therefore deny any liability to said Matthews.

The court gave judgment for the plaintiff and the defendants appeal. There are two insurmountable difficulties in the way of the defendants:

First—Plaintiff's assets or property in their hands was not seized by the garnishment process, because the *fieri facias* was not in the sheriff's hands when the interrogatories were answered; and the judgment against them in that proceeding was a consent judgment, not binding on the plaintiff nor in any manner divesting his title to the property in question.

Second—The judgment upon which the pretended garnishment process issued was an absolute nullity, because there was no citation served on Matthews, against whom it was rendered; and a seizure or sale under a judgment, void for want of a citation, neither confers a right nor divests a title.

It is therefore ordered that the judgment herein be affirmed with costs.

No. 3478.

JOHN H. STEPHENSON v. JAMES P. BROADWELL.

Where, on the trial, plaintiff introduced evidence in support of the averment of his petition, that his domicile is in the parish of Orleans, and therefore that defendant's reconventional demand, being disconnected with plaintiff's claim, could not be entertained, and the defendant offered a witness to contradict this evidence on the question of domicile, and the plaintiff excepted thereto;

Held—That the court *a qua* erred in sustaining the exception. The question of the domicile of the plaintiff was an important one, upon which depended to some extent, the fate of the plea in reconvention. If the plaintiff in fact had his domicile in the parish of Ascension, as alleged by defendant, the plea of reconvention could be heard. The defendant had an interest in contesting the point with plaintiff, and had the right to introduce evidence in support of his position, and to rebut the proof offered by plaintiff.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Roselius & Philips*, for plaintiff and appellee. *Lea, Finney & Miller*, for defendant and appellant.

WYLY, J. The plaintiff sued the defendant on his written obligation for \$8000; and the defendant, alleging that the plaintiff resided in the parish of Ascension, set up a reconventional demand, disconnected with plaintiff's demand, for \$9000. On the trial the plaintiff introduced evidence in support of the averment of his petition, that his domicile is in the parish of Orleans, and therefore the demand in reconvention can not be entertained. The defendant offered a witness

to contradict this evidence on the question of domicile, and the plaintiff objected on the ground that, as he had alleged in his petition and testified as a witness that his domicile was in the parish of Orleans, it would estop him from afterwards denying it, and therefore he might be sued here by the defendant. The court sustained the exception and the defendant took a bill of exceptions.

We think the court erred. The question of the domicile of the plaintiff was an important one, upon which depended to some extent the fate of the plea in reconvention. If the plaintiff in fact had his domicile in the parish of Ascension, the plea in reconvention could be heard. The defendant had an interest in contesting the point with the plaintiff, and had the right to introduce evidence in support of his position and to rebut the proof offered by the plaintiff.

It is therefore ordered that the judgment herein rejecting defendant's reconventional demand and condemning him to pay plaintiff the amount claimed in the petition be set aside and annulled; and it is now ordered that this cause be remanded, with instructions to admit the evidence offered by the defendant and otherwise to be proceeded in according to law, appellee paying costs of appeal.

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No. 3037.

ABRAHAM VANDINE et al. v. EHERMAN & LECANU et als.

The exception to the action must be sustained, where that action is a revocatory one and the petition itself discloses that there are, besides the defendants, other parties in interest who have not been made parties to the proceeding.

APPEAL from the Seventh District Court, parish of Orleans. *Oolens, J. J. S. Whitaker & Rice, Lacey & Butler*, for plaintiffs and appellants. *Cotton & Levy*, for defendants and appellees.

MORGAN, J. The object of this suit is to set aside as simulated and fraudulent, a certain sale of property by Joseph Kaiser to Eherman & Lecanu and Peter Kaiser, made to the prejudice of creditors.

The action is therefore a revocatory one, and as the petition discloses other parties in interest besides those who are made defendants, who were not made parties, we think the exception of the defendants should have been sustained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed; that the exceptions be maintained, and this suit be dismissed as in case of nonsuit. Appellants to pay the costs in both courts.

Rehearing refused.

Marchand v. The Loan and Pledge Association.

No. 3467.

A. MARCHAND v. THE LOAN AND PLEDGE ASSOCIATION.

A claim for money expended and time employed for the organization and benefit of the Loan and Pledge Association, before its incorporation, can not be regarded and enforced as a debt of that institution.

It is impossible to imagine how the defendant, a juridical person, incurred a debt before its existence.

Besides, it is shown that \$1000 of plaintiff's claim was for cash advanced for the purpose of influencing legislation; that is, bribing the Legislature to pass the act incorporating the Loan and Pledge Association.

For the recovery of money thus expended, this court can give no relief. The guilty suitor must be left where his immorality has placed him.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. W. H. Hunt and Hornor & Benedict*, for plaintiff and appellant. *J. Hawkins and Hays & New*, for defendant and appellee.

WYLY, J. Plaintiff sued defendant for the sum of \$4000 for services, etc., as alleged, viz:

"That, as a preliminary to the formation of said corporation, your petitioner, at the instance of the stockholders and members thereof, visited the cities of New York, Philadelphia and Boston for the purpose of acquainting himself with the proper formation and efficient management and practical operation of similar institutions in said cities, and that in order to do so he was compelled to expend for his traveling expenses, for consultation with counsel, and for obtaining information, considerable sums of money, and that he is entitled to be paid for the value of his time and services expended during said visit, which consumed some eight weeks, and that said expenses and said loss of time and services amount to the sum of \$1000.

"That petitioner furnished the charter for said corporation and gave zealous and efficient aid in presenting the same to the Legislature, in obtaining subscribers to the capital stock thereof, in organizing said corporation, in putting it in successful operation, in fitting up its place of business, in the purchase and erection of fixtures therefor, and in the performance of its business and management of its affairs for one month after it commenced operations, and that his services in that behalf are well worth the further sum of \$3000."

The answer is a general denial, and the averment that the association is not liable for services rendered before it went into operation as a corporation.

The court gave judgment for the plaintiff for \$208 33, the value of one month's service as president in organizing the company. From this judgment plaintiff appeals.

We see no error in the judgment. A claim for money expended and time employed, before the incorporation of the Loan and Pledge Association, can not be regarded as a debt of the institution.

How the defendant, a juridical person, incurred a debt before its existence we can not imagine.

Besides, it is shown that \$1000 of the plaintiff's claim was for cash advanced to S. F. Casanave for the purpose of influencing legislation; that is, bribing the Legislature to pass the act incorporating the Loan and Pledge Association.

For the recovery of money thus expended, this court can give no relief. The guilty suitor must be left where his immorality has placed him.

Judgment affirmed.

No. 5099.

THE STATE OF LOUISIANA v. JACOB TURNER.

On the day of trial the sheriff had not made his return as to a subpoena issued for a witness on behalf of the defendant. A motion for a continuance on this ground was overruled. The case, however, was continued until the following day, when the sheriff made his return that the witness was not to be found. The application for a continuance should have been renewed after the return of the sheriff. This not having been done, the court *a qua* did not err in proceeding to trial.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.* Criminal case. *O. T. Dunn*, District Attorney, for the State. *D. C. Morgan, Newton & Hall*, for defendant and appellant.

MORGAN, J. The day before the prisoner's case was fixed for trial, he caused a subpoena to issue directed to William R. P. Phillips. On the day of the trial the sheriff had not made his return. The prisoner's counsel moved for a continuance on this ground, which was refused. He then moved the court for time to prepare an affidavit for a continuance, on the ground of the absence of the witness. This motion was also overruled. To these refusals he reserved a bill of exception.

The case was continued over until the following day, when the sheriff made his return, that the witness was not to be found. No application was made for a continuance after the return was made. He was not injured by the refusal of the judge to grant him a continuance on account of the absence of his witness, before the return of the sheriff had been made. His application should have been renewed when the sheriff returned that the witness could not be found.

The same may be said with reference to the other objections urged by him. They were all made at an improper time, or were made too late.

Judgment affirmed.

Ricker v. Widow and Heirs of Pearson.

No. 3256.

SAMUEL RICKER v. WIDOW AND HEIRS OF JOHN H. PEARSON, and
SAMUEL RICKER v. ANNIE C. DIGGS, now ROSS.

This suit is instituted by the plaintiff against the purchasers at sheriff's sales, he claiming that the property was community property and belonged equally to his father and mother; that when his mother died the community was dissolved; that his mother's share descended to him; that his title thereto has never been divested; and that he should now be quieted therein.

The property was sold to pay community debts. Therefore the plaintiff's claim must be rejected.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Miles Taylor, James Brewer, Leovy, Monroe & Hart*, for plaintiff and appellee. *Hornor & Benedict, Hays & New*, for defendants and appellants.

MORGAN, J. The mother of plaintiff was married to Samuel Ricker, his father, in September, 1840. Plaintiff was born on tenth November, 1847. His mother died on the eighteenth of the same month. He was the only issue of their marriage. His mother's succession does not appear to have been opened.

On the seventeenth and eighteenth March, 1846, plaintiff's father purchased a large quantity of land from Josephine Beale and James William Beale, and on the sixth May, 1846, his mother purchased land from Octavine Beale. All this land lies in the parish of Jefferson.

No marriage contract existed between the plaintiff's father and mother. A community of acquets existed between them. The property above mentioned having been acquired during their marriage entered into the community. The debts contracted during the marriage were community debts.

In January, 1847, plaintiff's mother brought suit against her husband for separation of property. He alleges that this judgment was inoperative and null for various reasons. We do not think it necessary to decide this issue. We, however, concede it.

On the second of September, 1846, during the marriage, after the property now in question had been acquired, and before the suit for separation of property had been instituted, Pearson & Co. instituted suit against Ricker & Pearson for \$35,000, and on the tenth June, 1847, judgment by confession was rendered against them *in solido* for \$32,152 92, with a stay of execution till the first December, 1847. The Ricker, of Ricker & Pearson, was plaintiff's father.

In 1852 and in 1854 executions issued on this judgment, and the property bought by the plaintiff's father and mother was sold by the sheriff. This suit is instituted by the plaintiff against the purchasers at these sheriff's sales, he claiming that the property was community property and belonged equally to his father and mother; that when his

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48	724

26	391
152	1173
52	1181

26	391
114	389

Ricker v. Widow and Heirs of Pearson.

mother died the community was dissolved; that his mother's share descended to him; that his title thereto has never been divested, and that he should now be quieted therein.

. Under the authority of *Brown v. Jacobs*, 24 An. 530; *Sadler v. Kimbrough* 24 An. 534; *Rusk v. Warren, Crawford & Co.* 25 An. 314, and *Phelan v. Ax*, ib. 379, the plaintiff's claims must be rejected.

It is therefore ordered, adjudged and decreed that the judgment of the district court in these two cases be avoided, annulled and set aside, and that in both cases there be judgment in favor of the defendants, with costs in both courts.

No. 2548.

WILLIAM S. PIKE v. MERCHANTS' MUTUAL INSURANCE COMPANY.

Hawes & Bowen, of the city of New Orleans, transferred to W. S. Pike, as assignee of their creditors, the steamer "Wm. Tabor," of which they were sole owners. Pike effected an insurance on said steamer in the office of the defendant. A short time after, the master and mariners of the vessel committed barratry by causing her to be fraudulently stranded on the rocks near Key West. The vessel and cargo were brought to Key West, where a large portion of the cotton on board was condemned for salvage. The vessel then proceeded to New York, where, on her arrival, she was immediately libelled by the owners of the cotton for its non-delivery in consequence of the barratry of the master and mariners. She was sold to satisfy the decree for damages, and the proceeds were insufficient to cover them.

The instrument referred to purports to be a transfer or sale of the vessel, but the constituent elements of a contract, and not what the parties call it, must be considered in order to determine its character.

An examination of that instrument shows that it was neither a sale, nor a *contract of giving in payment*, but an innominate contract imposing certain limitations upon the ownership of Hawes & Bowen, and conferring certain rights as to the vessel upon the assignee in behalf of their creditors. It has the features of the contract of pledge and of the contract of mandate. It was not a sale which divested Hawes & Bowen of their ownership. Therefore, as the creditors were not the owners of the vessel, as they undoubtedly had an insurable interest in her, and as the policy was knowingly issued for their benefit, it follows that they can recover from the defendant through the plaintiff who is their representative, the loss resulting from the barratry of the master.

The plea of the defense that the loss occurred by stranding, and that stranding is not covered by the policy unless produced by stress of weather, or some other unavoidable cause, can not be maintained. It was the barratrous conduct of the master which caused the stranding and the loss; barratry being insured against, and the vessel being a total loss to the creditors, the plaintiff is entitled to recover.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Hays & New*, and *J. A. Rozier*, for plaintiff and appellant. *T. Parsons, John Lathrop* and *Albert Voorhies*, for defendant and appellee.

WYLY, J. In March 1867, Hawes & Bowen in this city transferred to W. S. Pike, as assignee of their creditors, the steamer "Wm. Tabor," of which they were sole owners.

Pike sent the steamer to Galveston for the purpose of taking a cargo to New York.

Pike v. Merchants' Mutual Insurance Company.

On the sixteenth of March, he effected an insurance on said steamer at and from Galveston to New York, in the office of the defendant, for \$20,000, paying the premium \$301 50.

On the seventh of April, the "Tabor" departed from Galveston for New York with a full cargo of cotton.

In a short time thereafter, the master and other employes, colluding with certain wreckers, committed barratry in fraudulently causing said vessel to be stranded on the rocks near Key West, that they might have the benefit of the salvage of the cargo on board.

The salvors subsequently brought the vessel and damaged cargo to Key West, where they were libeled, and by judgment of the court of Admiralty a large portion of the cotton was condemned for salvage, though certain of the salvors were excepted from the benefit of the decree by reason of their collusion with the captain. The "Tabor" then proceeded to New York where, within twenty-four hours after her arrival, she was libeled by the owners of the cotton for the non-delivery of the cargo as stipulated in the bills of lading, by reason of the barratry of the master and mariners. On the thirtieth of April, 1868, the vessel was condemned, and subsequently it was sold to satisfy the decree for damages occasioned by the barratry aforesaid, and the proceeds were insufficient to discharge the amount of damages awarded to said libelants.

The plaintiff then brought this suit against the defendant to recover the amount of the insurance, alleging that the barratry of the master was one of the perils insured against—that the loss of the vessel, in this instance, by the sale of the United States Marshal, was the result of said barratrous conduct, and that the petitioner, in his representative capacity, is entitled to recover from the defendant the full amount of the insurance.

A copy of the transfer or act of agreement between Hawes & Bowen and their creditors in reference to the steamer "Wm. Tabor," is made part of the petition. The defendant denied generally the allegations of the plaintiff, "with the exception of the facts:

First—"That the plaintiff was, at the time of the execution of the policy, the legal owner of said ship Tabor.

Second—"The alleged barratry of the master of said vessel.

"The defendant further denied specially, that the alleged loss, if any occurred, did occur from any stress of weather, collision or unavoidable causes."

The court rejected the demand of the plaintiff, on the theory: that if Pike is the representative of Hawes & Bowen, the owners of the "Tabor," he can not recover, because, in insuring, he was their agent and by the terms of the policy, as to the owners, the barratry of the

master was not insured against—that if the converse doctrine be true, that is to say, if the assignment conveyed title to the creditors, in effecting insurance for whom it may concern, W. S. Pike was acting for the creditors, the owners, and therefore under the policy, he can not recover.

In the contract of insurance we find the following clause : “ Touching the adventures and perils which the insurers are content to bear and take upon themselves in this voyage, they are the seas, jettisms, fire, enemies, men-of-war, pirates overpowering, but no other thieves, restraints and detainments of all kings, princes or peoples of what nation or quality soever, *barratry* (except embezzlement or theft) of the *master*, unless the insured be an owner of the vessel. ” * * *

The first question then is, in whose behalf was the insurance effected? Did Pike, in insuring “on account of whom it may concern” represent the owners of the vessel, or the creditors of the owners?

This is the main point involved in the controversy. Assuming the correctness of the alternate proposition of the learned judge *a quo*, his conclusion is undoubtedly correct. But considering the stipulations of the transfer, or article of agreement, made part of the petition, can we say that the ownership of the vessel passed to the creditors of Hawes & Bowen? If it did not, and the insurance was made in their behalf, they can certainly hold the insurers liable, under the contract, for the loss resulting from the barratry of the master. It is important, therefore, to determine the character of the contract between Hawes & Bowen and their creditors in regard to the steamer “ Wm. Tabor.”

The instrument purports to be a transfer or sale of the vessel; but, the constituent elements of a contract, and not what the parties chose to call it, must be considered in order to determine its character.

The act was passed before a notary. It declares in substance that, being desirous of making such a disposition of their property as would be best for the interest of all their creditors and to avoid expenses and delays of litigation, Hawes & Bowen do sell and transfer unto Wm. S. Pike, all their right, title and interest in and to the “ Tabor ” and two other vessels. “ It is hereby understood and agreed by all parties hereto that Pike, the said assignee, is to have power to sell and convey the interest of said Hawes & Bowen in said steamships, in such manner and on such terms as he may deem proper, exercising his own discretion and acting as he may think best for the creditors.” * * * “ It is further understood and agreed that said assignee merely undertakes to act as agent of the creditors and is to be held responsible for no loss to them except that resulting from bad faith and gross negligence in the discharge of his duties.” He is empowered to make such advances for and on account of said vessels as he may deem best to enhance their value

Pike v. Merchants' Mutual Insurance Company.

and promote their sales, and secure the payment of the claims of all the creditors, and for such advances he is to be allowed eight per cent per annum interest. He is further authorized to pay certain outstanding privilege claims against said vessels and is to become subrogated thereto.

"It is further understood and agreed that the creditors hereto signing their names do not release said Hawes & Bowen beyond the amount received from said assignee in payment of their claims." Wm. S. Pike accepts the agreement with the limitation as to his responsibility, and he agrees to sell the vessels or make such disposition thereof "as the interest of said creditors may require according to his judgment, and to pay over the proceeds of the same in full if the sums realized be sufficient, or *pro rata*, if not, to the several creditors. It is hereby understood and agreed that said assignee shall be allowed the commissions fixed by law for the compensation of syndics of insolvents." The various creditors who sign the contract declare, that they approve of the conditions and transfer to W. S. Pike of the vessels, for the purposes specified, and "*agree to desist from legal proceedings against said Hawes & Bowen*, and to await the action of said assignee in their interest as aforesaid and hereby approve the stipulation of said assignee respecting his liability in the discharge of his duties."

This instrument is neither a sale nor a contract of *giving in payment*, because, it does not contain an *aggregatio mentium* as to a fixed price. Revised Code articles, 2439, 2655, 2659. It is not a donation *inter vivos*, nor is it an exchange of one thing for another. It is a conventional obligation, but not such as is competent to transfer the ownership of the thing. It is an innominate contract, imposing certain limitations upon the ownership of Hawes & Bowen, and conferring certain rights as to the vessel upon the assignee in behalf of their creditors.

It has the features of a contract of pledge, because the thing is delivered to secure the creditors of the owners, with power to sell and apply the proceeds to the payment of their claims. Besides the essentials of a contract of pledge, the instrument contains a stipulation in reference to an assignee, defining his powers and liabilities and fixing his salary. In this respect, it has the features of the contract of mandate.

By the express terms of the agreement the creditors do not release Hawes & Bowen from any part of their liabilities; but they "*agree to desist from legal proceedings against them* and to await the action of the assignee," who undertakes to sell the vessel or make such disposition thereof "as the interest of said creditors may require according to his judgment, and to pay over the proceeds in full if the sums realized be sufficient, or *pro rata* if not, to the creditors." Under the contract the

title remained in Hawes & Bowen who, on paying their creditors, could have demanded the restitution of the vessel, at any time before the consummation of the contemplated sale by the assignee. As the creditors were not the owners of the vessel, and as it is proved that the policy was knowingly issued for their benefit, they can recover from the defendant the loss resulting from the barratry of the master.

As pledgees, the creditors undoubtedly had an insurable interest.

The defendant contends however, that the plaintiffs ought not to recover for the loss resulting from the barratrous stranding of the vessel, because, that clause of the policy insuring against the barratry of the master, is modified or limited by a subsequent clause, declaring that the insurer shall not be liable for any expense arising from the stranding or the grounding of the vessel, unless such stranding be caused from "stress of weather, collisions, or other unavoidable causes." It is true the policy contains the stipulation that: "This company shall not be liable for any loss or damage arising from, occasioned by, or occurring in consequence of, the bursting of any of the boilers, or collapsing of any of the flues, or the breaking of any of the machinery of said steamer, nor shall the said company be liable for any expenses arising from stranding or grounding of said steamer, unless such stranding or grounding be caused from stress of weather, or from collisions, or other unavoidable causes."

As the instrument should be construed so as to give effect if possible to every part of it, we do not see in the clause just quoted, any limitation on the one insuring against loss from the barratrous conduct of the master.

The stipulation that the company would not take the risk resulting from accidents to the machinery, nor consent to be held liable for losses resulting from stranding or grounding the vessel, unless the same occurred from "stress of weather, collisions or other unavoidable causes," does not in our opinion, have any reference to the clause insuring against the barratrous conduct of the master. The barratry of the master, without reference to the manner of committing it, is mentioned as one of the perils insured against, and there is nothing in the clause relied on, that can fairly be construed to except the peril of barratry, where the master choses to commit it in a particular way, that is to say, by stranding the vessel.

There is no force in the objection that the plaintiff can not deny that he is the owner of the vessel, because of the averments of the petition and the admission in the statement of the facts. The contract between Hawes & Bowen and the plaintiff is annexed to and made part of the petition, and in the statement of facts it is "admitted that the title to the ship is as per document annexed to and made part of the petition."

Pike v. Merchants' Mutual Insurance Company.

The defendant, however, contends that the loss was not the proximate, but the remote result of the barratry and, therefore, the plaintiff can not recover.

The rule is that : " All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself." 1 Story Rep. 164.

The barratrous conduct of the master caused the stranding of the vessel and the damage to the cargo, and the natural consequences thereof were, the claim for salvage, the libel of the vessel and its sale by the marshal, resulting in a total loss to the assured. The condemnation and forfeiture of the vessel was the legal consequence of the barratrous conduct of the master, because, if there had been no barratry, there would have been no foundation for the action, or for the libel of the vessel.

That the cargo was not insured is of no consequence.

The right of the consignees or the owners to libel the vessel for the damage and non-delivery of the cargo was, in this case, a direct consequence of the barratrous stranding of the vessel. 14 Pet. 99.

The failure to comply with the terms of the bills of lading, occasioned by the barratry, subjected the vessel to seizure and condemnation, and resulted in a total loss to the assured.

It is therefore ordered, that the judgment appealed from be set aside and annulled and it is now ordered, that the plaintiff, as assignee for the creditors of Hawes & Bowen, recover judgment against the defendant for the sum of twenty thousand dollars, with legal interest from judicial demand and costs of both courts.

ON REHEARING.

MORGAN, J. There can be no sale without a price. In the deed from Hawes & Bowen no price is stipulated. The debt, nor any part thereof, due from Hawes & Bowen to Pike, or to their other creditors was not discharged by the transfer. In fact, the Tabor was only placed in Pike's hands that it might be used for the benefit of Pike and his co-creditors. The legal ownership remained in Hawes & Bowen. The creditors joined in this act. This was necessary in order that the vessel should be sent forward on a voyage. They were willing to trust her under Pike's control. They probably would not have allowed her to leave port subject to the control of Hawes & Bowen. They would not have released the seizure then upon her and leave her under Hawes & Bowen's control.

Hawes & Bowen were not to be released from their indebtedness except in so far as the vessels transferred might go towards discharging the same. Pike was to sell the vessel or make such disposition of her

as the interests of the creditors might require, and to pay over the proceeds to the creditors.

Pike was therefore, the trustee of Hawes & Bowen. He was at the same time the agent of the creditors, and had the right, as it was his duty, to act in their interest.

The Tabor was sent on a voyage from Galveston to New York. Pike effected an insurance on her, for account of whom it may concern. The insurance was effected through Alexander Brother, and was made, as he informed the insurance company, in the interest of the creditors of Hawes & Bowen, and the insurance was accepted for them. It was therefore the creditors of Hawes & Bowen, *and not the owners of the Tabor*, who were insured. That the creditors, stating their interest, could insure with the consent of the insurer, can not be questioned. Hawes & Bowen, the owners were not insured. The amount insured does not cover the sums due to the creditors. Barratry of the master was insured against, unless the insured be an owner of the vessel. Plaintiffs not being the owners of the vessel, if the loss occurred from the barratry of the master, they are covered by the policy.

It is set up by the defense that, as the loss occurred by stranding, and as it is expressly stipulated that the company shall not be liable for any expenses arising from stranding or grounding, unless such stranding or grounding be caused from stress of weather, or from collisions or other unavoidable causes, and as the stranding was not the result of any of these causes, the loss is not covered by the policy.

The vessel was stranded in consequence of a leak; the leak was occasioned by the act of the master. It was the barratrous conduct of the master which caused the leak. The stranding was an incident to this barratrous conduct. It was therefore the barratrous conduct which caused the loss, and barratry being insured against, the company is liable.

The cargo of the ship was badly injured as the result of the barratrous acts of the captain. A large portion of it had to be sold. When the ship reached New York she was libeled and condemned to be sold to pay the damages, and she was sold. Practically, therefore, as to the creditors, she was a total loss. This loss can be traced directly to the acts of the captain, in a matter covered by the policy, and therefore, entitles the plaintiff to recover.

Good faith lies at the bottom of all contracts. It was the creditors of Hawes & Bowen whom the insurance company contracted to protect, and good faith requires that they should be held to their contract. It is their interest which is now protected.

For these reasons, in addition to those already given, it is now ordered that, our former judgment remain undisturbed.

Louisiana State Bank v. Hibernia Bank and Germania National Bank.

No. 3450.

LOUISIANA STATE BANK v. HIBERNIA BANK AND GERMANIA NATIONAL BANK.

Clayton, Williams & Co. absconded after being permitted to draw from the Louisiana State Bank \$5000 on the forged checks which they had deposited in said bank for collection. They had a cash balance already to their credit.

If the advance had been made to Clayton, Williams & Co. after the certification of the checks, or if the plaintiff had parted with its money in consequence thereof, there would be no doubt as to the liability of defendants. But it happens that the plaintiff paid out its money on the faith of the deposit of the forged checks, at least one hour and a half before the defendants gave the certification, or even had knowledge of the existence of the forged checks. The loss therefore was not the consequence of the certificate.

The plaintiff, holder of the forged checks, was promptly notified of the forging, as soon as discovered, and within six hours after the certification. Whether or not the plaintiff would have succeeded in capturing Clayton, Williams & Co., the forgers, and would have recovered the money, if the defendants had detected the forgery as soon as the checks were presented for certification, is not established with sufficient certainty to enable the plaintiff to recover, assuming that to be a good ground for recovering judgment, of which no opinion is expressed.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. John McConnell, O. Roselius, William H. Hunt*, for plaintiff and appellee. *J. Ad. Rozier, Gilmore & Sons, O. B. Buddecke*, for defendants and appellants.

WYLY, J. This suit was brought to recover of the defendants \$4685 40, the amount of loss sustained by the plaintiff on certain forged checks that were certified by the defendants to be good. The main ground of action is that if the defendants had detected the forgery when the checks were presented for certification, or had refused to certify them, the plaintiff would have had the party committing the forgery arrested, and would have captured the \$4685 40 which the plaintiff had advanced on said forged checks.

The facts, as stated by the counsel of the plaintiff, are as follows:

On the third of December, 1870, a person representing himself as a member of the firm of Clayton, Williams & Co., occupying the store No. 49 Delta street, presented himself at the Louisiana State Bank and opened an account by depositing to the credit of his firm the sum of \$815 in cash.

On the tenth of December, one week after the account was opened, the firm made two deposits of checks, the first amounting to \$9857 63 and the second to \$10,280 71, and during the day presented a check for \$5000, which was paid by the teller, P. Helm.

Later in the same day, say at near two o'clock, a second check was presented for \$10,000, which was not paid. Helm, the teller, who paid the check for \$5000, explains that he did so because the checks deposited were of firms he knew to be of good financial standing, but when the check for \$10,000 was presented, that he went to the cashier, Mr. Dupuy, and asked whether he should pay it; and adds: "Generally

on Saturday we did not pay checks when the deposit was made in checks. When large amounts were asked we generally asked a certified check, or that they should bring the cash money."

Mr. Dupuy, the cashier, told Williams to call on Monday, and that in the meantime he would get the checks certified, but that it was not usual to draw such large amounts on only check deposits.

The cashier, Mr. Dupuy, then gave directions to the teller to get the checks out, and have them sent to the banks severally upon which they were drawn to be certified.

At about three o'clock the runner of the bank, H. Rolling, started with the checks, and returned in about fifteen or twenty minutes and reported that the Hibernia Bank had certified the checks drawn on them; that the Merchants' Bank said the check on them was good and they would pay it next Monday morning, and that the teller of the Canal Bank said he was too busy then, but to come back in five minutes and they would certify or pay the check on them.

Being thus assured that these checks were "good," the plaintiffs were prepared, and the teller informs us would certainly have paid Clayton, Williams & Co. to the full amount of their deposit, if they had returned and demanded it.

Clayton, Williams & Co., however, did not return. They made their escape with the money already obtained by them on forged checks from plaintiff and other banks amounting to \$30,000.

Within six hours after the certification of the checks the defendants discovered the forgery, and they promptly communicated the information to the plaintiff or its agents.

When Clayton, Williams & Co. were permitted to draw the \$5000 on the forged checks which they deposited with plaintiff for collection, they had a cash balance already to their credit amounting to \$314 60. The loss sustained by the plaintiff was therefore the amount claimed, \$4685 40.

The court below gave judgment for the plaintiff, and the defendants appeal.

If the advance had been made to Clayton, Williams & Co. after the certification of the checks, or if the plaintiff had parted with its money in consequence thereof, there would be no doubt as to the liability of the defendant. But the truth is, the plaintiff paid out its money on the faith of the deposit of the forged checks at least one hour and a half before the defendants gave the certification, or even had knowledge of the existence of the forged checks.

In our opinion the plaintiff ought not to recover, because the loss of which it complains was incurred before the certification of the checks by the defendants, and not in consequence thereof.

Louisiana State Bank v. Hibernia Bank and Germania National Bank.

This case is like that of *McKeleroy & Bradford v. Southern Bank of Kentucky*, 14 An. 458, and must be controlled by it. There the holder before acceptance of the forged bill, was promptly notified of the forgery as soon as it was discovered by the drawees, which was twenty-two days after acceptance and payment. Here the holder of the forged check was promptly notified of the forgery and within six hours after the certification.

Whether or not the plaintiff would have succeeded in capturing Clayton, Williams & Co., the forgers, and have recovered the money, if the defendants had detected the forgery as soon as the checks were presented for certification, is not established with sufficient legal certainty to enable the plaintiff to recover, assuming that to be a good ground for recovering judgment, of which we express no opinion.

We will remark, however, that there seems to be little merit in the complaint that the defendants' mistake in certifying the checks forged by plaintiff's own customers, Clayton, Williams & Co., deprived the plaintiff of an early opportunity to search for and capture them. The plaintiff accepted Clayton, Williams & Co. as depositors without knowing anything of them, or making any inquiry as to their standing and honesty. If the plaintiff has lost in dealing with its own customers on the faith of a deposit of uncertified forged checks, it is a misfortune; and the fact that the defendants afterwards in error certified the checks, can not avail to shift the loss from the plaintiff to them.

It is therefore ordered that the judgment be annulled, and it is now ordered that there be judgment herein for the defendants, and that plaintiff pay costs of both courts.

Rehearing refused.

No. 5065.

MRS. MARY E. FELTUS v. BLANCHIN & GIRAUD.

The mortgage note, which is the object of this suit, was granted by plaintiff in injunction under the authorization of the judge, pursuant to the act of 1855. She therefore occupies no better position than a *femme sole*. If there was a want of consideration, it devolved on her to prove it.

The plaintiff excepted to the ruling of the court refusing to allow her to prove that her plantation was cultivated by her husband and his brothers during the years 1868 and 1869, and therefore the supplies furnished by the defendants did not inure to her benefit. The court *a qua* did not err in refusing the evidence, because it would have contradicted her judicial admissions in the petition for injunction.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J. Philips & Ogden*, for plaintiff and appellant. *Sambola & Ducros*, for defendants and appellees.

WYLY, J. The plaintiff enjoined the executory process of the de-

Mrs. Mary E. Feltus v. Blanchin & Giraud.

tendants on her mortgage note for \$8373 82, on the ground that the consideration thereof did not inure to her separate benefit; that the marital authority of her husband caused her to sign said mortgage note, and that it was given for the payment of his debts. It was also alleged that the mortgage was a continuing guarantee, and that the account of the defendant contains usurious interest and illegal charges. The court gave judgment dissolving the injunction and allowing the seizure and sale to be proceeded with, for the sum of \$3970 58. From this judgment the plaintiff appeals.

The mortgage was granted under the authorization of the judge, pursuant to the act of 1855. The plaintiff therefore occupies no better position than a *femme sole*. If there was a want of consideration, it devolved on her to prove it.

The plaintiff excepted to the ruling of the court refusing to allow her to prove that her plantation was cultivated by her husband and his brothers during the years 1868 and 1869, and therefore the supplies furnished by the defendants did not inure to her benefit.

We think the court did not err in refusing the evidence, because it would contradict her judicial admissions in the petition for injunction. Upon examining the evidence, we find it fully supports the judgment of the court below.

Judgment affirmed.

No. 3370.

EDWARD T. DENECHAUD v. JEAN TRISCONI.

28 402
105 205

The defendant clearly had no right to make material alterations in the leased premises without express permission. The injunction he appeals from did not restrain him from the exercise of any of the privileges and facilities he was entitled to by the terms of the lease.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Wooldridge & Thomas*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

TALIAFERRO, J. The defendant appeals from a judgment perpetuating an injunction.

In October, 1869, the plaintiff being the lessee of the Washington Hotel at Milneburg, on Lake Pontchartrain, sublet to the defendant, for the term of two years, to commence on the first day of January then next ensuing (1870), "the lower part of the Washington Hotel, comprising the bar room, saloon and appurtenances, cellar and sleeping room attached thereto," etc. It appears that it had been usual

with prior sub-tenants leasing the bar room and saloon on the basement story of the building to set out during the warm season, in the yard and garden around the hotel, tables with the usual refreshments required by visitors at that time of the year, and that this privilege was considered to be an appendage or appurtenance of the bar room. Much is said on the part of the defendant about an infringement of this privilege by the plaintiff. This privilege or right is not accorded to the defendant by the lease, but he was not prohibited from the exercise of it by the injunction taken out against him by the plaintiff. The grounds on which the injunction was taken out were these: The Pontchartrain Railroad Company, who own the hotel and adjoining grounds, erected within a short distance of the hotel a pavilion for public resort, where visitors were furnished refreshments, music and amusements of various kinds. This building was completed and opened to the public on the first of June, 1870. It was leased to the plaintiff. A fence separated it from the hotel. The intervening space between the pavilion and the hotel had formed part of the lake, and was covered with water previous to its being filled up by the company. The true bone of contention between these litigants seems to have been in regard to obtaining custom to their respective establishments, the plaintiff desiring to have things so arranged that persons coming from the pavilion to the hotel would necessarily pass to his restaurant on the second story, while the defendant desired an arrangement that would bring them to his saloon on the basement.

The plaintiff, it seems, closed the gate letting through the fence on the way from the hotel to the pavilion, and made another gate within a short distance, and through which the pathway led more directly to the stairway leading up into the restaurant. The main purpose of the injunction, it seems, was to prevent the defendant from reopening a gate through the fence at the place the plaintiff had closed the former one. At a point less directly between the pavilion and the hotel, the defendant did of his own accord open a gate through the fence, and this gate was not closed, although the injunction restrained the defendant "from making any further alterations in the premises known as the Washington Hotel," and ordered him "to forthwith place the premises in the condition they were at the time he leased the same from the plaintiff."

The defendant clearly had no right to make material alterations in the leased premises without express permission. The injunction did not restrain him from the exercise of any of the privileges and facilities he was entitled to by the terms of the lease. His right to set tables in the yard or garden of the hotel was not interfered with. The

Denechaud v. Trisconi.

pavilion was not built at the time the contract of lease took place between the parties, and none of the advantages that might accrue from it to either were in their contemplation when their contract was entered into.

We think the judgment of the court below should remain unchanged.

Judgment affirmed.

Rehearing refused.

96	404
46	1191
26	404
112	577

No. 3388.

MRS. REGINA PHILLIPS v. THE LOUISIANA EQUITABLE LIFE INSURANCE COMPANY.

The insurance company, defendant in this case, refuses to pay, on the ground that the policy excepted liability, "if the insured should die by his own hands," and it alleges that he committed suicide.

It is evident that these words can not be interpreted in their literal sense, for they would exempt the company from liability if the insured came to his death by the accidental discharge of a gun or pistol in the hands of the insured, or if he took poison through a mistake, while they would not exempt the company from liability if the insured were to commit suicide by jumping into a precipice or a river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words, and the court thinks that the common intent was to exempt the company from liability from the *voluntary destruction* of the insured by whatever means accomplished.

It is not believed that, by the expression above mentioned, the parties intended to exempt the risk that the insured might become insane, and might, when in that state, commit suicide.

The test of responsibility in civil, as well as in criminal cases, is the state of the actor's reason or mental faculties. Therefore, if the deceased were insane when he committed the act of self-destruction, no responsibility attached to his act.

The onus of proof is on the party who affirms the fact that the insured died by his own hand, and this has not been legally proved in this case.

It is true that the witnesses who testify as to his death express it as their *opinion* that he killed himself or committed suicide, but their opinions can not be regarded as evidence of the fact; nor do the facts and circumstances proved point to the voluntary self-destruction of the insured, to the exclusion of all other reasonable hypothesis. But if that fact were established, the plaintiff has proved that the deceased was insane at the time of and before his death.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Cotton & Levy* and *A. B. Phillips*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

LUDELING, C. J. This action was instituted to recover the amount of a policy of insurance on the life of H. F. Morse, issued on the fourth of October, 1869. Morse died at Abbeville, Louisiana, on the fifteenth of March, 1870.

Proof of his death was made by his widow, and payment was declined, on the grounds that the proof furnished of the death also proved he had committed suicide, and that the policy excepted liability of the company "if he should die by his own hands."

The questions presented for solution are new in this State. They are:

Mrs. Regina Phillips v. The Louisiana Equitable Life Insurance Company.

First—What is the meaning of the exception, “if he die by his own hands?”

Second—Did the assured take his own life, and was the policy avoided thereby?

I. It is evident the words can not be interpreted in their literal sense, for they would exempt the company from liability if the insured came to his death by the accidental discharge of a gun or pistol in the hands of the insured, or if he took poison through a mistake, while they would not exempt the company from liability if the insured were to commit suicide by jumping from a precipice or into the river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words. C. C. 1945, 1950. This common intent, we think, was to exempt the company from liability for the voluntary self-destruction of the insured, by whatever means accomplished

The defendant ingeniously argues that this clause or proviso of the policy should be interpreted to mean any suicide, and especially suicide superinduced by insanity, as the voluntary suicide of one not insane would be such a fraud upon the company that the insured could not recover even in the absence of the proviso; and he cites the case in 27 Penn. Report, p. 466, *Hartman v. Keystone Insurance Company*. We can not agree with him. We do not believe the parties intended to exempt the risk that the insured might become insane and might, when in that state, commit suicide. But we think that it was to guard against the possibility of the very fraud spoken of by the counsel that the clause was inserted in the policy. The test of responsibility in civil, as well as in criminal cases, is the state of the actor's reason or mental faculties. Blackstone, vol. iv. pp. 21 and 189; C. C. art. 1788, 1789. Therefore if the defendant were insane when he committed the act of self-destruction, no responsibility attached to his act.

II. Did the insured die by his own hand? The onus of proof is on the party who affirms this fact. And we do not think it has been legally proved. It is true that the witnesses who testify as to his death express it as their opinion that he killed himself or committed suicide; but their opinions can not be regarded as evidence of the fact. Nor do the facts and circumstances proved point to the voluntary self-destruction of the insured, to the exclusion of all other reasonable hypothesis. All the facts and circumstances proved, in regard to his death, are that he retired to his room at bedtime, and about one o'clock at night the report of a pistol was heard. When the inmates of the house came to the room, the insured was found in a reclining posture on the sofa and a pistol was lying on the floor near by. He had been shot in the mouth. It is possible that he might have shot himself

Mrs. Regina Phillips v. The Louisiana Equitable Life Insurance Company.

accidentally, or that an enemy might have found him sleeping with his mouth open and shot him in the mouth to avert suspicion. The evidence, being circumstantial only, proves nothing since it does not exclude all other reasonable hypothesis. But if that fact were established the plaintiff has proved that the deceased was insane at the time of and before his death. See Reynolds on Life Insurance, page 105, *et seq.*, Mutual Life Insurance Company of New York in error v. Mary Terry, decided by the Supreme Court of the United States in April, 1873.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Rehearing refused.

No. 4768.

STATE ex rel. T. WHARTON COLLENS v. CHARLES CLINTON, Auditor.

The same reason upon which the power of the Legislature rests to increase the number of courts in New Orleans, exists for the power it possesses to decrease the number.

Article 83 of the Constitution of 1868 announces that the General Assembly may establish in New Orleans as many district courts as the public interests may require, wholly irrespective of any particular number of courts. It may diminish or increase that number according to its discretion.

If it be granted that article 83 of the constitution must be considered and interpreted in connection with the other articles of the same instrument on the same subject matter, to wit: articles 81, 84, 97, 110, 122 and 158, it is important not to overlook that article 83, so far as relates to the organization of the district courts of New Orleans, is express and special. It is a well recognized rule that general legislation does not control special legislation on the same subject matter.

All those articles which treat of district courts, tenure of office, removal of judges, etc., as a general subject, must be subordinated to article 83, so far as their provisions are in conflict or inconsistent with the special provisions of article 83, in relation to the district courts of New Orleans. By this rule it is possible to harmonize, and give effect to, each and every one of the articles that have been enumerated, instead of becoming bewildered in a labyrinth of difficulties, vainly endeavoring to limit and circumscribe the special provisions of article 83, by giving a controlling power over them to the general provisions of the other articles.

The abolishment of the court over which the relator presided was a legislative act, which the General Assembly of Louisiana had the constitutional power and right to perform. That act was not an *ex post facto* law. There was no obligation or contract violated. It was simply the exercise of a power and discretion with which the General Assembly was clothed before and at the time the relator came into office.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Lea, Finney & Miller*, for relator and appellant. *J. Q. A. Fellows, A. P. Field*, Attorney General, for defendant and appellee.

TALIAFERRO, J. The relator prayed for a writ of mandamus ordering the Auditor of Public Accounts to issue to him a warrant for \$1250, the amount of one quarter's salary, alleged to be due to the relator as judge of the Seventh District Court of New Orleans, on the thirty-first day of December, 1872, and also for the further sum of \$1250 for salary due him on the thirty-first of March, 1873.

The Attorney General, for the Auditor, filed an exception that the relator had no cause of action. The court below made the mandamus peremptory to the extent of ordering the Auditor to issue his warrant in favor of the relator for salary due him prior to the fourteenth December, 1872, but discharged it in so far as it required the Auditor to issue a warrant for salary alleged to be due subsequent to that time. The relator has appealed. From the statement of facts found in the record it appears that the relator was elected judge of the Seventh District Court of New Orleans on November 4, 1872; was commissioned and took the oath of office; that he entered upon the discharge of the duties of the office and continued to discharge those duties until the going into effect of an act of the Legislature passed on the fourteenth of December, 1872, abolishing the Seventh District Court of New Orleans. The relator specially charges that the said act of the Legislature is unconstitutional, void and without effect. The solution of this question is necessary in the decision of this case.

Looking to article 83 of the constitution, we should consider the reason upon which it rests and the purposes which the framers of the constitution intended it should accomplish. There were six district courts in New Orleans when the constitution of 1868 went into effect. The growth of the city, the increase of its population and business, a possible increase of litigation might render it desirable, and it might become important to the public interests that the number of district courts should be increased. On the other hand, a stationary condition or a retrograding state in the amount of population, or even a decrease of litigation might require a decrease in the number of the courts. The same reason upon which the power of the Legislature rests to increase the number of courts in New Orleans exists for the power it possesses to decrease the number. Article 83 announces that the General Assembly may establish as many district courts as the public interests may require. It is within its discretion to determine how many district courts in New Orleans the public interests may require. If it should decide that the public interests require more than seven district courts in New Orleans it may establish more. If it should decide that the public interests require a smaller number of district courts than seven, it has equally the right to establish a smaller number. The constitution vests in the Legislature the power to establish the number of district courts in New Orleans which in the judgment of the Legislature it may determine the public interests requires, wholly irrespective of any particular number of courts. The ever changing state of human affairs imposes upon the Legislature the duty of adapting its legislation to the various phases which the condition of the country and the wants of the community may from time to time assume. Upon this great

principle the eighty-third article of the organic law empowers the General Assembly to increase in New Orleans the number of district courts whenever in its judgment the enforcement of the laws, the ends of justice, and the dispatch of the business of courts may require such increase; and in like manner to decrease the number when in its discretion public interests and public economy may require a decrease.

We are told this article of the constitution must be considered and interpreted in connection with the other articles of the constitution on the same subject matter, the articles 81, 84, 97, 110, 122 and 158. Granted. But let us not overlook an important feature that is presented in this discussion, and that is, that article 83, so far as it relates to the organization of the district courts of New Orleans, is express and special. It is a well recognized rule that general legislation does not control special legislation on the same subject matter. All those articles that treat of district courts, tenure of office, removal of judges, etc., as a general subject must be subordinated to article 83, so far as their provisions are in conflict or inconsistent with the special provisions of article 83 in relation to the district courts of New Orleans. By this rule we harmonize and give effect to each and every one of the articles we have just enumerated, instead of becoming bewildered in a labyrinth of difficulties, vainly endeavoring to limit and circumscribe the special provisions of article 83, by giving a controlling power over them to the general provisions of the other articles.

Articles 81 and 97 prescribe the manner and form of removing judges, which can only be done by impeachment or address, without any reference to the continuance of the office. These articles contemplate the removal of judges for mal-conduct in office, or for gross neglect in performing their duties, or for other causes. But can this article be invoked in behalf of an incumbent who, *ex necessitate rei*, ceases to exercise judicial functions from the abolishment of the court over which he presided? Article 83, as we have seen, clothes the General Assembly with the power to establish in New Orleans the number of district courts it may deem requisite for the public interests, and that it is not restricted to the establishment of any number. The case under consideration is in point. There were, previous to the act of the Legislature of fourteenth December, 1872, eight district courts of New Orleans. The General Assembly reduced the number to seven by abolishing two of those courts and establishing another. The General Assembly chose to establish seven district courts in New Orleans, deeming that number sufficient to subserve the public interests. There being eight, how else could it make the number seven without abolishing one of those courts? The warrant for so doing is clearly granted not only by the obvious spirit and meaning of that portion of article 83, which relates exclusively to

the district courts of New Orleans, but even by its very letter. The sentence is : " For each district there shall be one district court, except in the parish of Orleans, in which the General Assembly may establish as many district courts as the public interests may require." Does this language mean that the General Assembly has only the power to increase the number of district courts in New Orleans, and is powerless to abolish or dispense with one or more of those courts in order to decrease the number, however much the public interests might demand it? Such an interpretation is surely not logical or sound.

It would seem, from the line of argument employed to deny the right or power of the General Assembly to reduce the number of district courts in New Orleans, that while it is contended that all the articles of the constitution bearing upon the subject of district courts, the term of office of the district judges, etc., should be taken and construed together, still those using that argument rely upon each of those articles of a general character, separately considered, without its connection with all. They say in substance, quoting from article 84 : " The judges of the district courts shall hold their office for the term of four years," therefore the Legislature can not deprive a district judge of his right to hold his office four years. This article separately considered renders the tenure of office of district judges absolutely fixed and irrevocable. The incumbent can not be removed for any cause whatever. because the article reads, " the district judges shall hold their office for four years," and there is not in the article one word that authorizes the office they hold to be vacated. But what becomes of such a construction when we turn to articles 81 and 97 ? We find that the tenure of office for four years is not absolute, but contingent upon good conduct and upon events that might authorize removal by address for reasonable cause.

All the judges of Louisiana hold their offices contingent upon the arising of causes which the constitution declares shall be ground for removal or dismissal. The district judges of New Orleans, by the special provision contained in article 83 of the constitution relating to the district courts of the city, hold office upon a contingency special and personal to them, namely, the happening of a state of things that would authorize the General Assembly in its discretion to reduce the number of courts, when, in such an event, a judge or judges of the district courts of New Orleans, superseded by a legislative act sanctioned by the constitution, would become necessarily *functus officio*. There is in such a case no removal of an incumbent, because when the court he presided over is abolished, the office that appertained to that court ceases to exist and there is no office from which he could be removed. And where is there good and valid ground for complaint in

such a case? It might be characterized as one of the ills or inconveniences of office holding; but that there is a violation of right in such a case can not be maintained. The paramount law of the State confers the power upon the General Assembly to create or abolish district courts in New Orleans in the public interest. If in the exercise of that power an individual should be put to loss or inconvenience by losing the office he held, where is the wrong? Did the office belong to him? Shall his convenience and interests be consulted rather than the public welfare? Is it meet that an unnecessary expense and burden should be kept upon the community to maintain a court not needed in order that the officeholder may be indulged in continuing in office? The judge who is elected or appointed to the office of district judge in the parish of Orleans, is elected or appointed to that office subject to this contingency, that may or may not happen during his term. He accepts the office subject to its vacation, if the General Assembly determine that the public interests require it.

There seems to exist a belief that the incumbent of a public office acquires what is frequently called a vested right, in the sense that he holds an absolute, indefeasible title or right to the office. Surely, while the provisions of the organic law that are intended to give efficiency and stability to the tenure of office, are to be sacredly maintained, we may not disregard other portions of that law, which for special reasons applying to particular offices, render incidentally the tenure of those offices precarious through paramount considerations of the public good.

The relator in this case, it appears, was elected to the office of district judge of the Seventh District Court of New Orleans at the general election in November, 1872. The State Constitution of 1868, containing the provisions in regard to the district courts of New Orleans which we have had under review, was then, as it is now, the paramount law of Louisiana. The abolishment of the court over which he presided was a legislative act, which the General Assembly of Louisiana had the constitutional power and right to perform. That act was not an *ex post facto* law. There was no contract or obligation violated by it. It was simply the exercise of a power and discretion with which the General Assembly was clothed before and at the time the relator came into office. Subject to the exercise of this power he sought and obtained the office which he filled. He has no just ground therefore to set up a violation of his constitutional rights. When the law was enacted which dispensed with the Seventh District Court of New Orleans, he ceased to be the judge of that court, which, when the law abolishing it was promulgated, became a thing of the past. He was no longer authorized to exercise the functions of a judge. He was no longer called

upon to discharge the duties of a district judge. His claim for the salary which appertained to the office as long as it existed, is a just claim. His demand for salary after the office became extinct is not one that can be recognized.

From the operation of just and wholesome laws, real as well as imaginary hardships often arise, and frequently results occur which may cause regret from personal or private considerations. In the present case the act of the Legislature of fourteenth December, 1872, operates adversely to the interests of an able and upright judge; but no exception can on that account be taken to the law itself. Private advantage and private interests must yield to public advantage and public interests. We must give laws their proper force how much soever in isolated cases their operation may be opposed to individual interests.

We conclude that the decree of the court *a qua* in this case was correctly rendered.

Judgment affirmed.

WYLY, J., *dissenting*. I adopt as my dissenting opinion in this case the following argument, submitted by Judge Collens:

The Seventh District Court for the parish of Orleans is one of the courts created by the State Constitution. At the general election held on fourth November, 1872, the relator was duly elected by the people to be judge of that court for the four ensuing years, and he was duly inducted into office. On the fourteenth December following the Legislature passed an act abolishing this court, and another court entitled the Eighth District Court, which had been created by statute. At the same time and by the same act the Legislature created the Superior District Court. The question is, was the act so far as it undertakes to abolish the Seventh District Court, constitutional? I am convinced that it is not.

I can not admit the rule of interpretation by which a single article of the constitution is made to override and defeat the general and unqualified provisions manifestly intended to insure the independence of the judiciary. I think, on the contrary, that we should seek to give force and effect to every article and disposition of the instrument; and that there is no difficulty in construing article 83 with all the rest so as to give effect to the whole, and moreover to the clear spirit and policy indicated throughout. That article 83 contains a special clause in regard to the creation of additional courts in the parish of Orleans there can be no doubt, but there is nothing else in that article which deprives the judges of the protection given in the most unqualified manner by articles 81, 84, 97, 122, 158, and the other clauses of article

83, defining the tenure, term of office, election, mode and cause of removal, salary, and jurisdiction of the judges.

The relator was elected for four years, and it is provided that during that term of office his territorial jurisdiction shall remain unchanged; that he shall hold his office during that term; that in the meantime his salary shall not be increased or diminished, and that he shall not be removed except by impeachment or suspension. There is no inconsistency to force us to hold that any exception has been made in regard to the courts of the parish of Orleans, unless the expressions of article 83 be made to mean more than they say, and that the Legislature may abolish the constitutional courts as well as create additional ones. The rule of interpretation is the converse of the one adopted by the court. Exceptions should be strictly construed, not enlarged, particularly when they derogate from the general principles and guarantees of right, liberty and independence. The result, from enlarging or adding to the exception, is to make the constitution, in its most vital and paramount elements, self-contradictory, and different in different parts of the State. True, the phrase "until otherwise provided by law," in article 83, refers to the number of courts; but the power of the Legislature, in this respect, is defined by the provision allowing the creation of "as many as the public interests may require." The very fact that the possible necessity of a greater number is expressly foreseen, but no lesser number expressly permitted, confirms this construction.

Even the construction in favor of the power to diminish the constitutional number does not hold good in this case, for it would not apply to the facts. The constitutional number is seven; the eighth was an additional court created by statute. The act of fourteenth December, 1872, is made to abolish these two, the seventh and the eighth, and to create another, the superior court, in their stead. Thus there would be still seven district courts, but the effect is nevertheless that one of the constitutional courts is abolished, though there is no actual diminution of the number. Even such reduction "as the public interests may require" below the seven created by the constitution, is not intended or effected; and yet the seventh one is not the one established by the constitution. The operation of the act plainly is to accomplish indirectly and under a false pretense what could not have been done directly. A judge elected by the people for four years has been legislated out of office, and another legislated into his place. If there were a frank and *bona fide* diminution of the number of courts established by the constitution, or if the superior court were an additional one, there would be no ground for charging the act of the Legislature with being colorable; but by the *modus operandi* the superior court has really become the seventh one, and a palpable, though indirect, evasion of the constitution is perpetrated.

All such devices and colorable attempts have been condemned by the wisest judges of this country. The courts of our sister States have invariably maintained judges in their office during the term for which they were elected or appointed, despite such legislation as this; and have decided that changes, such as attempted in this instance, could, if at all, only take effect after the expiration of a constitutional term. 3 Cranch 160; 1 How. 316; 6 Wall. 39; 7 How. 458; 13 An. 345; 23 Ill. 547; 62 Penn. 345; 21 An. 491; 23 An. 784; 6 Cow. 651; 9 Cow. 640; 1 Cow. 564; 3 Serj. & R. 155; 4 Met. 237; 2 Denio 274; 14 Wis. 163; 65 N. C. 603; 9 Watts 200; 65 Penn. 76; 2 Sand. 640; 15 Iowa 538; Cooley on Cons. p. 46; 4 Ark. 220; 6 Serj. & R. 322; 5 Serj. & R. 403; 14 An. 198.

No. 5074.

ROBINSON MUMFORD v. MRS. S. T. BOWMAN AND HUSBAND.

26	413
45	180
26	413
152	378
26	413
100	219

The acceptance of a succession is express, when in an authentic or private instrument, or in some judicial proceeding, the purpose of the heir is declared in terms so clear and distinct that no doubt can exist of his intention to accept under the responsibilities that result from an acceptance pure and simple. To incur the liability arising from an acceptance pure and simple, something more than styling himself heir in some written act, authentic or judicial, must appear in the instrument, in order to bind the party absolutely to pay all the debts of the succession out of his own means.

Both in the express and tacit acceptance it must be made clear, that it was the intention of the party assuming the quality of heir to abide the disadvantages, if any should arise, of accepting simply and purely, as well as to enjoy the benefits that might accrue from it. In the one case, the intention is to be found in a fair interpretation of the terms and expressions of written instruments; in the other, it is to be inferred from acts, the motives of which can not be ascribed to any other purpose.

The subject matter of the written acts in which, by styling herself heir, it is contended in this case that the defendant became bound for the debts of the succession, presents collateral issues not involving the question of heirship, and in no manner relating to the acceptance of the succession.

The term *heir* has several significations. Sometimes it refers to one who has formally accepted a succession, and taken possession thereof; sometimes to one who is called to succeed, but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. Hence, the use of the word *heir* in itself is of but little moment. It is the *object* and *intent* manifested by its use that is the material thing.

A PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J. W. W. Leake, Race, Foster & E. T. Merrick*, for plaintiff and appellant. *Thomas Butler, William H. Hunt*, for defendant and appellee.

TALIAFERRO, J. The plaintiff in this case having a large claim against the succession of Daniel Turnbull, deceased, obtained a judgment upon it. He received as his final distributive share as a creditor the sum of \$1519 93, the estate being insolvent. He now sues Mrs. Bowman, a daughter of Daniel Turnbull, alleging that as heir of her

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father she accepted his succession purely and simply, and has thereby rendered herself liable for its debts. He sets out that she has assumed the quality of heir in certain written acts and judicial proceedings which he refers to. He also charges that the defendant has taken possession of certain sugar kettles and a quantity of fire bricks, the property of the succession, and converted the same to her own use without accounting for their value; and by this act he alleges she has become liable as an heir accepting purely and simply.

The answer is a general denial. The defendant specially denies that she ever accepted the succession as charged by the plaintiff.

There was judgment in favor of the defendant, and the plaintiff has appealed.

The judge *a quo* has diligently reviewed the several written acts and judicial proceedings in which the plaintiff alleges the defendant has assumed the character of heir, and from his reference to them we give their character:

"The first written act relied on by the plaintiff, as amounting to an express acceptance, is the one marked A, and appears to be a compromise between defendant and the representatives of her deceased brother, who but for their renunciation would have been their coheirs. This compromise was based upon a suit, No. 72, then pending in the parish court, wherein the defendant was plaintiff against Mrs. Caroline B. Turnbull, natural tutrix of her (the plaintiff's) minor nephews. It sought to force them to a collation and partition with her of a large donation." The judicial proceedings adduced in evidence by the plaintiff are marked B, C and D. "The first of these is an opposition to the application of Mrs. Caroline B. Turnbull, tutrix, for letters of administration on the succession of Daniel Turnbull; claims that her mother is the qualified executrix, and that if an administrator has to be appointed, she, the opponent, is entitled to it by preference over all others.

The next is an intervention in the suit of Mrs. Lapice, a creditor, to annul and set aside a certain judgment of homologation of an account of the executors of Daniel Turnbull's estate, in which Mrs. Bowman joins the executrix and acquiesces in the judgment of homologation.

In the last she opposes some very large claims against the succession, placed on a tableau or classification of debts by the executrix. In these and other judicial proceedings the defendant styles herself "the legal forced heir of her father, Daniel Turnbull;" "the only heir of said deceased of age," and "one of the legal forced heirs of her father, Daniel Turnbull, and a legatee under his will."

The only inquiry in this case is, has the defendant accepted the succession of her father purely and simply in the manner contemplated

by law to render an heir personally liable, out of his individual property or means, for the debts of the estate which he accepts? Article 988 of the Civil Code declares: "The simple acceptance may be either express or tacit. It is express when the heir assumes the quality of heir, in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir."

We understand that the acceptance is express when in an authentic or private instrument, or in some judicial proceeding, the purpose of the heir is declared in terms so clear and distinct that no doubt can exist of his intention to accept under the responsibilities that result from an acceptance pure and simple. We imagine that to incur the liability arising from an acceptance pure and simple, something more than merely styling himself heir in some written act, authentic or judicial, must appear in the instrument in order to bind the party absolutely to pay all the debts of the succession out of his own means. The responsibility of accepting purely and simply would in many cases prove serious, and in some it might, as in the case under consideration, be ruinous. Therefore it would seem that in an express acceptance, the purport of the instrument must be clear that the party intended, without legal formalities, to assume all the responsibilities of a pure and simple acceptance, as well as all the advantages of heirship. This, we think, becomes apparent by considering the last clause of the article 998 and the article 990, which treat of the tacit acceptance. The tacit acceptance is a matter of inference, but to warrant the inference "it is necessary that the intention should be united to the fact, or rather be manifested by the fact, in order that the acceptance be inferred."

Both in the express and tacit acceptance it must be made clear that it was the intention of the party assuming the quality of heir to abide the disadvantages, if any should arise, of accepting purely and simply as well as to enjoy the benefits that might arise from it. In the one case, the intention is to be found in a fair interpretation of the terms and expressions of written instruments; in the other, it is to be inferred from acts, the motives of which can not properly be ascribed to any other purpose.

To revert now to the written instruments in which it is alleged the defendant assumed unqualifiedly the character of heir, we find by the document A, before referred to, that the donation which was required to be collated was made in 1854 by Daniel Turnbull and his wife to their son, William Turnbull, and consisted of a large tract of land and a great number of slaves. This donation was made at a time when

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the donor was in affluent circumstances, and most likely before the creditors of Daniel Turnbull became such, for none of them have complained of it. This donation contained a stipulation that its value was to be collated with coheirs on the decease of the donors. The representatives of the donee and their coheir were alone concerned. The property donated did not belong to the succession of Daniel Turnbull. His creditors had no interest in it. The proceedings had no relation to his succession. The creditors of Daniel Turnbull were not parties to these proceedings, and were not bound by them. Then it is of no moment to them, the defendant's styling herself the heir of Daniel Turnbull. It is palpable that in this act of compromise there is nothing showing her intention to accept his succession purely and simply. Neither is there evinced in the judicial proceedings already referred to, marked B, C and D, the intention of the defendant to accept purely and simply the succession of her father. That succession, by one of the great events of the late war, became hopelessly insolvent by the general emancipation of slaves. The greater part of the ample fortune of Daniel Turnbull consisted of slaves. His lands depreciated in value. His large plantation, like many others, became a wreck. These facts were well known to the defendant. It is shown that she never acted in business matters, sounding in law or legal proceedings, without legal advice.

On the death of Daniel Turnbull, an inventory was made of his estate. The surviving widow, executrix of the will, together with her co-executor, took the estate in charge. An account was filed by them in March, 1865, and homologated by the clerk, and Towles, the executor, was discharged. In 1867 the executrix filed a provisional account, and in 1872 a final account and tableau of distribution, which were homologated.

Thus, then, it is seen that there was an inventory legally made of the succession of Daniel Turnbull; that it has been administered by the executrix, and its assets distributed according to law. It has not been shown that the defendant has ever had possession of the effects. But if she had taken possession, it may well be questioned whether the formal inventory of the succession, made under judicial authority, would not protect her from liability beyond its assets, according to article 1006 of the Civil Code: "An heir of age accepting simply is bound personally for all the debts, * * * unless before acting as heir he make a true and faithful inventory of the effects of the succession," etc.

The allegation that the defendant caused to be removed from the plantation of the estate sugar kettles and a lot of fire bricks is not sustained by the evidence. On the other side, it is shown that those

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articles were removed by the consent of the executrix, who authorized the husband of the defendant to remove them, and that the removal was unknown to the defendant.

The subject matter of the written acts, in which, by styling herself heir, it is contended the defendant became bound for the debts of the succession, presents collateral issues not involving the question of heirship, and in no manner relating to the acceptance of the succession. In the language of the learned judge who decided this case in the court *a qua*, "the term *heir* has several significations. Sometimes it refers to one who has formally accepted a succession and taken possession thereof; sometimes to one who is called to succeed, but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. C. C. 1017 et al. Hence the use of the word heir is in itself of but little moment. It is the object and intent manifested by its use that is the natural thing. Thus in France it has been held that 'when I give through an officer of the law a legal notification to my cousins, that I also am an heir of our deceased uncle, and that I object to the seals being raised without notice to me, it is clear that I do not accept, although I have taken the title and quality of heir, for here the word heir evidently signifies capable of inheriting.' 3 Marcadé, Tit. Des Suc., No. 204, and decisions there quoted."

* * * * *

"That when the effects of the succession have never been in the possession of the heir, but are administered by another, under an inventory duly made, the heir who has neither accepted simply nor renounced, but remains silent, is, after full administration and payment of debts and legacies, entitled to the residuum; that being thus entitled to this residuum, he has such an interest in increasing it that he may intervene and oppose an account of the administrator, which allowed claims not due by the succession, and, if he can, defeat them; that although in this judicial proceeding he style himself 'heir,' he is presumed to appear as beneficiary heir, and does not thereby incur the penalty pronounced by article 998 of the Civil Code."

We see no error in the decree of the district court.

Judgment affirmed.

HOWELL, J., *dissenting*. The express acceptance is, "when the heir assumes the quality of heir, in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding." R. C. C. 988, ¶ 2.

When Mrs. Bowman, in June, 1866, intervened in the judicial proceedings relating to her father's succession, she did so as heir, assuming

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the quality of heir, and opposed certain other judicial proceedings, which she believed would impair or prejudice her rights as heir, and in doing this she did not qualify in any manner the assumption or assertion of her heirship. She declared in emphatic or unqualified terms "that she is one of the legal forced heirs of her father, Daniel Turnbull, deceased, and a legatee under his will," and in another place "she admits that she is the only forced heir of said deceased of age," acquiesces in the judgment homologating the account of the executrix, and asks that the demand of a creditor for annulling said judgment be dismissed. These are proceedings and demands which she could institute and urge only as heir, and were so instituted and presented in the belief at the time, as I think, that the succession would prove to be valuable.

Having assumed the quality of heir, in an unqualified manner, in those judicial proceedings, after the inventory was made, she became liable for her share of the debts, and could not afterwards be relieved by her own acts. The articles 1010 et seq., cited by her counsel, do not, in my opinion, apply to the state of facts which exists in this case.

I think the court has given an interpretation to article 988 of the Code which its terms do not sustain, and very different from the one given to it in the case of *Le Cesne v. Cottin*, 2 N. S. 475.

Rehearing refused.

No. 4959.

MRS. LOUISA REICH, Wife of RHODOR, v. HYACINTHE ROSSELIN, et als.

Plaintiff applied for authority to borrow money to a judge of competent jurisdiction, and was by him authorized to borrow it. The act of mortgage was not consummated until her authority to borrow had been obtained. If any force, threats, or improper influences were brought to bear upon her by her husband, it does not appear that the defendant, who loaned the money upon the faith of the authorization of the judge and the security of the mortgage was, in any manner, a party to it. The plaintiff's injunction to prevent the sale of her property must be dissolved.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. E. C. Mix*, for plaintiff and appellee. *Jerome Meunier*, for defendant and appellant.

MORGAN, J. Plaintiff seeks to enjoin the sale of her property, which has been advertised under an order of seizure and sale. She says she was forced by her husband to effect the mortgage for which she is now being proceeded against, and that none of it inured to her benefit, but went, exclusively, to her husband. She applied for authority to borrow the money to a judge of competent jurisdiction, and was by him

Mrs. Louisa Reich v. Rosselin et als.

authorized to borrow it. The act of mortgage was not consummated until her authority to borrow had been obtained. If any force, threats, or improper influences were brought to bear upon her by her husband, it does not appear that the defendant, who loaned the money upon the faith of the authorization of the judge and the security of the mortgage, was, in any manner, a party to it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, that there be judgment for the defendant, and that the injunction herein granted be dissolved, with costs in both courts.

Rehearing refused.

No. 4922.

SUCCESSION OF JEAN MARIE SARNIQUET and INTERDICTION OF PHILOMENA SARNIQUET. (Consolidated).

In 1867, in opposition to an application of the natural tutrix of Philomena Sarniquet for a sale of property belonging to the succession of Jean Marie Sarniquet, father of said Philomena, Joseph Sarniquet set up, without success, his title as sole legal heir of his deceased brother, said Jean Marie Sarniquet. The issue is therefore, *res judicata*. He can not now revive the question by bringing suit and alleging that Philomena Sarniquet is not the legitimate daughter of Jean Marie Sarniquet and not entitled to his property.

The prescription of ten years is also pleaded correctly. Philomena Sarniquet, now of age, but an idiot, has, through her tutrix, been in possession of the property as heir for twenty years. Hence the prescription of ten years is a complete bar to the action.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. W. E. Murphy* for plaintiff and appellee. *Julien A. Seghers*, for defendants and appellants.

WYLY, J. In 1852, Jean Marie Sarniquet died leaving a small succession and a surviving widow and three minor children.

In December of that year, Mrs. Sarniquet was confirmed as natural tutrix and in that capacity and as widow in community she was put in possession of the property belonging to said succession.

Since then all the children have died except one, Philomena, who is of age, but an idiot, residing in Kentucky, where she was interdicted and John Blackburn appointed her guardian. In 1871, John Blackburn brought suit in the Second District Court praying to be recognized as guardian and to be put in possession of all the property belonging to said tutorship on the ground that said interdicted person is the sole surviving heir of Jean Marie Sarniquet. He also prayed for the sale of the property and for authority to remove the proceeds arising from said sale to Kentucky where he lives and where he was appointed guardian.

This was opposed by Joseph Sarniquet, a brother of the deceased,

Succession of Sarniquet.

on several grounds, and the court sustained the opposition so far as to require the mother of the interdicted person, who was her tutrix, to be made party, which was done. Subsequently, Joseph Sarniquet brought suit, alleging that Philomena Sarniquet was not the legitimate daughter of Jean Marie Sarniquet and is therefore not entitled to the property; he also prayed to be recognized as heir and put in possession, on the ground that he is a brother of the deceased and his sole legal heir.

In bar of this action the tutrix and John Blackburn, guardian, pleaded :

First—Res judicata.

Second—The prescription of ten years. Pending the issue, Joseph Sarniquet was appointed administrator of the succession of Jean Marie Sarniquet. It was then agreed that the cases should be consolidated and all the issues be tried together. The tutrix and John Blackburn guardian, reserving the benefit of the exception pleaded in bar of Joseph Sarniquet's demand, answered to the merits. The court gave judgment in favor of Joseph Sarniquet recognizing him as sole heir and ordering him to be put in possession. From this judgment the tutrix and John Blackburn have appealed.

We think the court erred in not sustaining the exception pleaded in bar of Joseph Sarniquet's demand.

In 1867, in opposition to an application of the tutrix for a sale of the property in question, he set up, without success, his title as legal heir of his brother, Jean Marie Sarniquet. The issue is *res judicata*. Besides, Philomena Sarniquet, through her tutrix, has been in possession of the property as heir for twenty years. The prescription of ten years is a complete bar to the action.

John Blackburn, guardian, is entitled to the property and should be recognized and put in possession.

It is therefore ordered, that the judgment appealed from be annulled, and it is now ordered, that the demand of Joseph Sarniquet be rejected, and it is ordered that John Blackburn be recognized as guardian of Philomena Sarniquet and that he be put in possession of the property; that he be authorized to sell it according to law and to remove the proceeds and all moneys belonging to said Philomena Sarniquet to Kentucky, where he was appointed guardian.

It is further ordered that Joseph Sarniquet pay costs of this appeal, and also costs of his suit to be recognized as heir, and costs of the application for administration in the court below; the other costs in the court below to be paid out of the funds of Philomena Sarniquet the interdicted person.

Rehearing refused.

State of Louisiana v. Shenhausen.

No. 4924.

STATE OF LOUISIANA v. O. H. SHENHAUSEN.

26	421
47	1575
47	1591
26	421
49	133
26	421
116	233

The defendant alleges that the words "paper currency of the United States," do not describe the statutory offense of robbery.

The charge in the indictment is the felonious and violent taking of "the sum of seventeen hundred and forty-five dollars in paper currency of the United States of America."

This comes within the law. R. S. sec. 810.

The objection that the words "promissory note of the value of three hundred dollars," do not conform to the statute, because not showing that it was for the payment of any specific property, is not well founded.

Section 1051 makes it sufficient to describe "the instrument, matter or thing by any name or designation by which the same may be usually known without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing."

This law, as stated in 10 An. 230, cited by defendant, is an exception to the general rule of the common law as to description, and is complied with in the indictment here.

The defendant's bill of exceptions to the refusal of the judge to grant a continuance to enable the counsel appointed to represent him to prepare the defense, can not be maintained. It seems there were three days between the appointment and the trial. This is sufficient time when no special cause is shown for longer delay, nor is such a delay essential in itself.

No law authorizes to move for attachments against absent jurors on the list, in order to bring a greater number, when there are enough present to complete the panel. It is a matter in the judge's discretion; and the non-attendance of some of the jurors summoned and not excused, is not good cause for a refusal to go to trial.

The judge *a quo* did not err when refusing to admit an affidavit against the wife of the defendant, charging her with receiving stolen property, being a part of the property described in the indictment. It was introducing a new issue from the one at the bar.

There was no error in refusing to allow the defendant to propound to his own witness certain questions which are specified in his bill of exceptions. If intended to impeach the witness, they were not allowable to the party introducing him. Otherwise, they were irrelevant to the issue.

The court instructed the jury in the general charge that: "To constitute robbery there should be actual or constructive force." This was correct, and substantially what the counsel asked.

The court was also asked to charge that, "in the proof of taking, it is necessary to show that the goods were actually in the possession of the accused." The court, in giving the charge, added the words, "or constructively" after the word "actually" and before the word "in." There was no error in this.

The bill of exceptions to permitting a witness to refer to his books, out of the presence of the court, in order to refresh his memory, was not well taken.

The jury found the accused guilty of robbery and larceny on the indictment containing the two counts, and hereupon, on motion of the Attorney General, a *nolle prosequi* was entered on the second count as to larceny, and the accused was discharged therefrom. There is no error in this proceeding.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. P. Field*, Attorney General, for the State, appellee. *Walter H. Rogers*, for defendant and appellant.

LUDELING, C. J. The defendant has appealed from a judgment sentencing him to ten years' imprisonment at hard labor, and assigned as error.

I. The words "paper currency of the United States of America," do not describe the statutory offense of robbery.

The objects in the statute are: the robbery or larceny of "Bank notes, obligations or bonds, bills obligatory or bills of exchange, pro-

missory notes for the payment of any specific property, paper bills of credit, certificates granted by or under the authority of this State or of the United States, or any of them, shall be punished," etc. Revised Statutes § 810.

The charge in the indictment is the felonious and violent taking of "the sum of \$1745 in paper currency of the United States of America." This comes within the law; but if there were a fatal variance as to this object or item, it would not vitiate the indictment as to the next.

II. The words "promissory note of the value of three hundred dollars" do not conform to the statute, not showing that it was "for the payment of any specific property."

Section 1051, R. S., makes it sufficient to describe the "instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing."

This law, as stated in 10 An. 230, cited by defendant, is an exception to the general rule of the common law as to description, and is complied with in the indictment here.

The defendant insists upon his bill of exceptions to the refusal of the judge to grant a continuance to enable the counsel appointed to represent him to prepare the defense. It seems there were three days between the appointment and the trial. This is sufficient time, where no special cause is shown for longer delay. Nor is such a delay essential in itself.

The next bill is to the refusal of the judge to grant a continuance to have two absent jurors attached, and for the return of twelve others then sitting in their room in another case. The judge adds that the defendant had the whole panel to select from, except two or three who were absent, before talesmen were called.

As said in *State v. Baldwin*, 11 An. 81, no law authorizes to move for attachments against absent jurors on the list, in order to bring in a greater number, where there are enough present to complete the panel. It is a matter in the judge's discretion; and the non-attendance of some of the jurors, summoned and not excused, is not good cause for a refusal to go to trial. *State v. Johnson*, 11 An. 422.

A bill was taken to the refusal to admit an affidavit against the wife of the defendant, charging her with receiving stolen property, being a part of the property described in the indictment herein. The judge did not err. It was introducing a new issue outside of the one at bar. Nor was there error in the refusal to allow defendant to propound the following questions to his own witness, a detective police officer, to wit:

First—"Did you execute or attempt to execute the search warrant based on the affidavit against Rosa Schonhausen, made by Officer Smith against the person or property of said Mrs. Schonhausen, and if yea, with what result?"

Second—"Did you not say to the accused, after his arrest and while in your custody, not to be afraid about his affair; that you had the girls (referring to female witnesses for the State) fixed all right?"

Third—"Did you say to the accused that you would give him one thousand dollars if he would give evidence against Julius Socha, his former employer, and one of the parties indicted with the said accused?"

If intended to impeach the witness, it was not allowable for the party introducing him; otherwise they were irrelevant to the issue.

Counsel for accused asked the court to charge the jury that "to constitute robbery, there must be actual violence inflicted on the person robbed, or such demonstrations or threats under such circumstances as to create in him reasonable apprehension of bodily injury." The court instructed the jury in the general charge that "to constitute robbery, there should be actual or constructive force," and repeated it when asked as above. This was correct, and substantially what the counsel asked. Greenleaf on Evidence, vol. 3, § 229.

The court was also asked to charge that, "in the proof of taking, it is necessary to show that the goods were actually in the accused's possession." The court, in giving the charge, added the words "or constructively" after the word "actually" and before the word "in." There was no error in this. See Greenleaf on Evidence, vol. 3, § 228.

The bill of exceptions to permitting a witness to refer to his books, out of the presence of the court, in order to refresh his memory, was not well taken. Greenleaf on Evidence, vol. 1, § 437.

The jury found the accused guilty of robbery and larceny on the indictment containing the two counts, whereupon, on motion of the Attorney General, a *nolle prosequi* was entered on the second count as to larceny, and the accused was discharged therefrom. There was no error in this. 4 An. 31, 434.

Judgment affirmed.

Rehearing refused.

Packard v. Ober, Atwater & Co.

No. 3005.

J. Q. PACKARD v. OBER, ATWATER & CO. J. Q. PACKARD v. OBER, ATWATER & CO., GARRARD & CRAIG, and JOHN P. MOORE. (Consolidated.)

Compromises have no immunity from decrees of nullity, where errors of fact bearing upon the principal cause of the compromise and coupled with fraud, are shown to exist, and in such cases, said compromises must be declared null and void.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. A. N. & W. F. Ogden*, for plaintiff and appellee. *R. & H. Marr, Wm. H. Hunt, Semmes & Mott*, for defendants and appellants.

WYLY, J. In February, 1868, Ober, Atwater & Co., sued the firm of Packard & Co., composed of John Q. Packard and James B. Packard, in the Fifth District court, parish of Orleans, for \$17,896 66, for balance of account due them as factors. In answer to this suit the plaintiff John Q. Packard, pleaded a general denial; alleged that he and J. B. Packard were ordinary partners engaged in cultivating plantations in the parishes of Concordia and Tensas; denied that they were in any sense commercial partners, and alleged "That on the eighteenth of May, 1867, this defendant and the said J. B. Packard as ordinary co-partners, were jointly indebted to the plaintiffs for advances of money and supplies to carry on the business of planting, amounting to the sum of \$18,303 49, and no more; that, on or about the twenty-fifth of May, 1867, the said indebtedness was fully paid and extinguished in the following manner, to wit: The plaintiffs purchased of defendants the "Live Oak" plantation, situated in the parish of Concordia, and on the last named day, defendants duly conveyed said plantation to the plaintiffs by public act passed before the recorder of Concordia parish and duly accepted by plaintiffs for and in consideration of the sum of \$10,000, which sum was to be applied in part payment of said balance \$18,303 49, and the balance, to wit: the sum of \$8303 49, was settled and paid by the individual note of said J. B. Packard, made and delivered to the said Ober, Atwater & Co., on or about the twenty-fifth of May, 1867, which note has since been fully paid to the plaintiffs by the said J. B. Packard." * * * He further alleged that since said date the said Ober, Atwater & Co., have made other advances of supplies and money for planting purposes, the precise amount of which he is unable to state, but for a less amount than is claimed by plaintiffs in their petition, and that all the advances so made have been fully paid by large sums received by them from California for him (the exact amount he is not able to state because they have not rendered him an account) and by the receipt of eighty-six bales of cotton from him, the product of the crop of 1867, the proceeds of the sale thereof still re-

maining in the hands of said Ober, Atwater & Co., and unaccounted for, but this defendant is informed and believes they amount to the sum of \$6500, and also by the receipt of the proceeds of 3000 sacks of seed from the plantation in the parish of Tensas, and that when the defendants are duly and properly credited with the money received from California and the proceeds of said consignments, he alleges that the demands of the plaintiffs against him will be found to be fully canceled and paid.

These are the averments of the answer which was filed on the tenth of March, 1868. On the twenty-fourth of September, 1868, Ober, Atwater & Co., filed a supplemental petition, showing that since filing the original petition, the indebtedness of the defendants, Packard & Co., to them had been reduced to \$16,570 45, and they prayed for and obtained a writ of attachment on the ground that, John Q. Packard was about leaving the State permanently. Under this writ the sheriff seized all the products and movables of John Q. Packard on the Viamede plantation in the parish of Tensas.

On the twenty-seventh of November, 1868, John Q. Packard compromised this suit with Ober, Atwater & Co., fixing the amount of his indebtedness to them at \$12,000 by mutual consent; "and all demands of the one against the other are hereby merged and included in said sum of \$12,000."

It was further agreed that all the property attached should be delivered to Ober, Atwater & Co., at the appraised value thereof at the time the attachment was levied, except 1000 bushels of corn reserved to pay the rent due by Packard for the Viamede plantation; the cotton gathered and to be gathered, was to be shipped to Ober, Atwater & Co., and sold, and the broom corn was likewise to be sent to market and sold. Out of the estimated value of the property and the proceeds of the crops to be shipped to market and sold, Ober, Atwater & Co., were to pay certain privilege claims and the wages and rations of the laborers and overseer on said plantation—the expense of saving the crop and the costs of suit. The costs of attachment and of keeping the property while in the custody of the sheriff and the fee of Packard's attorney were also to be paid by Ober, Atwater & Co.

The residue of the property and proceeds, after paying the specified claims, was to be applied to the payment of the \$12,000 due by Packard to Ober, Atwater & Co. If any surplus remained it was to be paid over to Packard; and if there was a deficit, Packard authorized his attorney to confess judgment for the amount thereof, with eight per cent. interest and with a stay of execution for twelve months.

In February, 1869, the plaintiff John Q. Packard, brought this suit to annul the compromise of the twenty-seventh of November, 1868, and

to recover from the defendants Ober, Atwater & Co., the sum \$25,000, the value of his property on the Viamede plantation, obtained by them in virtue of said compromise. He also sued Ober, Atwater & Co., and the sureties on the attachment bond for \$25,000 damages for illegally attaching his said property.

These two suits are consolidated, and the judgments adverse to the defendants rendered therein by the court *a qua*, are now submitted for revision to this court. We will first examine the suit to annul the compromise and to recover the value of the property received by Ober, Atwater & Co., in virtue thereof.

The plaintiff alleges that said settlement or compromise "was made in error and under a mistake of facts on his part—and through fraudulent practices on the part of the defendants in this, that believing the defendants to be honest men, and not being familiar with matters of account, he believed the sum sued for by them to be the true sum for which he was liable, less such payments as had been made, but since said settlement he has learned that the defendants have overcharged him by way of usurious interest, illegal and exorbitant commissions, and by errors in footings and double entries, in the full amount of six thousand dollars." He also alleges that he was entitled to certain credits besides those appearing in the account of Ober, Atwater & Co. "And petitioner further says, that before said settlement he was led to believe, and believes, through statements made by defendants and testimony which petitioner then believed, that the said deed made by him of the Live Oak plantation to defendant, Albert G. Ober, for the benefit of said firm of Ober, Atwater & Co., had not been accepted by John Janney, the duly authorized agent of the defendants, a fact which the petitioner could not know, for the reason that the acceptance, if made at all, was made in his absence, and laboring under said belief he made said settlement without taking into account the payment of the ten thousand dollars to be credited for the conveyance of said Live Oak plantation; and since said settlement petitioner has learned that said deed was duly accepted by the said agent, John Janney, and the same is binding upon the defendant, and for the conveyance of said Live Oak plantation he should be credited on the account exhibited against him in said suit in the full sum of ten thousand dollars. That if all said errors are corrected in said account and all his payments therein are duly credited he believes, and therefore avers the fact to be, that at the time of said settlement he was not and is not now indebted to the defendants to any extent whatever." That in consequence of said settlement, "made in error and induced through the deception and the fraudulent practices of the defendants," they have obtained his property, worth \$25,000.

The prayer of the petition is that said settlement be declared a nullity and set aside, and that petitioner have judgment against the defendants for said sum.

The allegation that the defendants charged usurious interest and commissions, is no ground to annul the compromise; because the accounts containing them had been rendered to him before the compromise, and he did not act in error on that account. The errors complained of in the footings and double entry, and also the allegation that the defendant is entitled to certain credits besides those appearing in the account of Ober, Atwater & Co., are not established by the proof in the record. Besides the plea of payment filed in the suit on the tenth March, 1868, admitted the correctness of the said account. The sole ground, then, for annulling the compromise is the alleged error as to the acceptance of the deed of the Live Oak plantation by Janney, the agent of the defendants.

The plaintiff contends that it was an actual giving in payment to Ober, Atwater & Co., though in the form of a sale, for ten thousand dollars cash to Albert G. Ober. The defendants, however, contend that it was intended merely as collateral security for the debt of \$18,303 49, due by plaintiff to them.

The error which plaintiff insists vitiates the compromise, is that he was led by the statements of the defendants to believe that Janney, their agent, had not accepted the deed at the time of the compromise. It appears that in May, 1867, the plaintiff made a written agreement with Albert G. Ober to sell him the Live Oak plantation, in the parish of Concordia, for ten thousand dollars cash, the vendor retaining possession till first January following, and reserving the right to redeem it by returning the purchase price; the vendee was not to bind himself to pay any of the existing mortgages on the property.

On the twenty-second May, 1867, John Q. Packard and J. B. Packard appeared before the recorder of the parish of Concordia to pass the deed pursuant to agreement. Albert G. Ober wrote to John Janney, advising him of the proposed contract and asking him to accept the act in his behalf. When the notary came to draw the deed he inserted a clause binding Ober to pay a special mortgage of \$7500 existing on the property, believing it was necessary to do so in order to make a valid act. The Packards being in a hurry signed the act and left. Janney was not present. When he came to examine the instrument he refused to accept it, because it was not drawn according to the agreement of the parties. In July, 1867, Albert G. Ober wrote to Janney, telling him that he did right in not accepting the deed, because it was not drawn according to instructions, but advising him now to accept it, and to let the error stand till corrected by the Packards hereafter.

Under this instruction the deed was accepted by Janney, although he seems to have entirely forgotten it and also the receipt of the letter of July, 1867. About the time of the compromise he told Ober he had not accepted it; Ober told Sheldon, the attorney of Packard; and a few days afterwards Janney, Ober, Sheldon and Packard happen to meet on a steamboat, and Janney told them he had not signed the act. Even at the trial Janney swears he could not recollect having signed the deed, or the receipt of the letter of July, 1867, but his genuine signature was affixed to the instrument and the letter was attached thereto showing his authority to accept. It is very certain that Janney was honestly mistaken, for he could have had no motive in misinforming the parties. Ober swears he believed the statement of Janney to be true at the time the compromise was made; he informed Sheldon thereof, but had no communication whatever on the subject with Packard. The compromise was suggested by the attorneys while taking testimony in the case.

Sheldon, the attorney of Packard, swears: "That the settlement was made in the belief, on my part, that the facts as to the deed were very doubtful at least, if not decidedly against Mr. Packard; and I never had an intimation that the amount sued for by Ober, Atwater & Co. was otherwise than correct, and I am confident that Mr. Packard believed that they rendered to him accurate accounts, until some time after the settlement, although he has never been convinced that Mr. Janney did not sign the deed, and upon this point I think he yielded to my judgment, and I was decidedly of the opinion that if he could get a deduction of half the amount expressed in the deed, or nearly so, it would be best for him; and I believe, from present recollection, that nearly that sum was deducted."

So it appears from the testimony of his legal adviser that Packard has never been convinced that Mr. Janney did not sign the deed, but yielded on this point to the judgment of his attorney, who was of the opinion that if he could get a deduction of nearly half the amount expressed in the deed it would be best, and nearly that sum was deducted in the compromise. But why should Packard be in ignorance as to the acceptance of the deed, an authentic act which had been standing for a year and five months recorded in the parish of Concordia, an adjoining parish to his residence? Besides, as a defense to the suit, eight months before the compromise he specially pleaded that he had conveyed in part settlement of the demand the Live Oak plantation, and that the deed was "duly accepted." Is it to be supposed that a party who is sued for \$17,896 66, and who has discharged \$10,000 thereof by the giving in payment of a plantation, will remain in ignorance of the consummation of the deed for eight months after he

sets up this defense, when he knows that the desired information stands upon the public records of an adjoining parish and an authenticated copy of the deed can be had at a small expense and with a little delay? How could there be any difficulty or doubt about the acceptance of the deed. The act was authentic, and of course Janney had to sign it in the presence of the recorder and two witnesses.

We are of the opinion that if Packard made the compromise in error of fact in respect to the acceptance of the deed, he was in no manner misled by the defendants; and it was because he failed to use reasonable diligence to get the information where he knew it could undoubtedly be found with little delay and at trifling expense. This was the most important defense to the suit which he had eight months before pleaded, and no prudent man would abandon it in the compromise if he thought it a good defense without making some exertion to procure evidence of the fact, during the period of that eight months. Besides, if the plaintiff had seen fit he could have protected himself by inserting in the act of compromise a clause that it was made upon the condition that the deed or act of giving in payment had not been consummated by acceptance.

It does not appear that Albert G. Ober has ever obtained possession of the Live Oak plantation; on the contrary, we find in the record a notarial act in which, in a few weeks after the compromise, he renounces and disclaims any title whatever to said plantation and abandons the same to John Q. Packard and James B. Packard.

The compromise which the plaintiff seeks to annul was made by mutual consent of himself and the defendants for the purpose of putting an end to the law suit between them, and he preferred it to the hope of gaining, balanced by the danger of losing; it has a force equal to the authority of the thing adjudged. Revised Code, articles 3070, 3078. It ought not to be annulled for the reasons set up by the plaintiff.

Entertaining this view of the subject, it becomes unnecessary to examine the other questions presented in the case.

As the compromise can not be annulled, the suit upon the attachment bond must be rejected because it is one of the issues settled in the compromise.

It is therefore ordered that each of the judgments in these consolidated cases be annulled and reversed, and that there be judgment in both suits for the defendants with costs. It is further ordered that the reconventional demand be rejected as of nonsuit, and the right be reserved to each of the litigants in a separate suit to demand the enforcement of the reciprocal obligations of the compromise.

ON REHEARING.

TALIAFERRO, J. The main question in this case is as to the legal and binding force of the compromise entered into between the parties on the twenty-seventh of November, 1868. The facts upon which Packard, the plaintiff, bases his right to claim an annulment of the compromise appear to be these: That in the spring of 1867 a settlement of accounts took place between the parties and the indebtedness of the plaintiff fixed at \$18,313 49; that in payment and liquidation of this sum he sold to the defendants the Live Oak plantation in the parish of Concordia for \$10,000, and for the remainder, \$8303 49, he executed his promissory note; that the deed of conveyance he signed in Vidalia before the recorder of the parish of Concordia on the twenty-seventh of May, 1867; that defendants authorized John Janney to accept the act and sign it for them, which he subsequently did but not at the time the plaintiff signed it; that on the twenty-ninth of February, 1868, he was sued by Ober, Atwater, & Co. for the sum of \$17,896 60.

In defense of this suit Packard set up payment by sale of the Live Oak plantation and the note for \$8303 49, executed by him at the settlement in May, 1867. In September following, the defendants took out a writ of attachment and seized the crop of the plaintiff on the Viamede plantation in the parish of Tensas, together with a number of mules, farming utensils, etc. This attachment was sued out upon an affidavit that the plaintiff was about to depart permanently from the State. A motion was made to set aside the attachment, and pending this motion the plaintiff's counsel was informed by one of the defendants that Janney had not signed the deed for the Live Oak plantation, and in a few days afterward the plaintiff's counsel saw Janney himself and he informed the counsel that he had never signed the act. During the progress of the trial suggestions took place between the counsel of the parties that a compromise had better be made. The plaintiff's counsel informed him of the statements that had been made in relation to the signing of the deed by Janney, and he suggested under that state of affairs that Packard had better agree to a settlement. This at first he declined, but afterward he acceded to the proposition, and the compromise was entered into. Packard now asseverates that he was induced to enter into this compromise solely under the belief that the deed had not been accepted, and the contract of sale of the Live Oak plantation not consummated, and that his supposed payment of \$10,000 of his indebtedness to Ober, Atwater & Co. was a failure. We imagine that compromises have no immunity from decrees of nullity where error of fact, bearing upon the principal

cause of the compromise, and coupled with fraud, are shown to exist. Here the error of fact alleged is, that Packard believed when he entered into the compromise that Janney had not signed the act of sale when the truth was that he had signed it; that this belief had been brought about by the defendants; and supposing he would be unable to maintain his payment of \$10,000 of his debt to the defendants by the transfer to them of the Live Oak plantation, he acceded to the compromise. To determine the plaintiff's right to be relieved from the effect of this compromise we must look closely to the facts as we find them in the record.

On the part of the defendants it was sought to be shown that the deed to the Live Oak plantation was in reality only intended to operate as collateral security or as a mortgage to secure the payment of the debt owing to the defendants by plaintiff. But the instrument must speak for itself. It seems clearly to be a sale with right of redemption. In drawing up the act, the notary introduced of his own motion a clause by which the purchaser was held bound to pay an outstanding mortgage debt against the plantation of about \$7000. Janney, it seems, who was the agent or attorney in fact of Ober, Atwater & Co. authorized to accept and sign the act for them refused to accept it, as it contained this stipulation not agreed to by his principals. We find in the record an act called "a rescission," purporting to be explanatory of the deed of sale of the plantation as to the stipulation we have mentioned as having been introduced by the notary and ignoring the same, and further declaring the intention of the parties to rescind the entire act and binding Packard to execute a mortgage on the Live Oak plantation to secure his indebtedness to defendants. This explanatory act, it seems, was never consummated. As shown by the record, it was not signed by any of the parties. We understand that, after this time and with full knowledge on the part of Ober, Atwater & Co. of the contents of the deed of the Live Oak plantation, they authorized Janney to sign the act, trusting to some other arrangement by which to be held harmless against the stipulation to pay the outstanding mortgage note against the property. A singular state of doubt and uncertainty amounting almost to perplexity arose in regard to whether or not Janney, as the agent of the defendants, ever signed the deed in question. Janney had declared that he had no recollection whatever of having ever signed it, and, in broader terms perhaps, that he had not. The counsel for the plaintiff states that pending the proceedings relating to the attachment, Ober came to his office and told him he had investigated the question, and had employed experts to examine the original deed and compare Mr. Janney's real signature with that to the deed, and they had pronounced the signature not genuine, and that

Mr. Janney denied that he ever signed the deed at all. The counsel further stated in his testimony that, in a day or two after, he saw Janney and asked him about it, and that Janney told him that he had never signed the deed, and would so swear. These statements of Ober and Janney were communicated to Packard, and used by his counsel to induce him to enter into the compromise. From the drift of the evidence bearing upon the views and motives of the parties in regard to this act of compromise, we think it shows that it was willingly and even with avidity sought for on the part of the defendants, while on the part of the plaintiff it was at first rejected and afterwards agreed to with some degree of reluctance, and finally gone into solely on the advice of his counsel, who seems to have been satisfied that the deed of sale had not been consummated.

It would be well now to look at the situation of things and the attitude of the parties at the time they entered into this compromise act. In regard to the signing of the deed by Janney, the truth is that it was signed by him; for, several months after he signed it, he went to Vidalia and examined the deed, and he states in his evidence that the signature was his and that he had signed it. It is clear, we think, that when he agreed to the compromise, Packard was in ignorance of the fact that Janney had signed the deed, but believed that he had not. It is in proof that during the year 1868, Packard was cultivating a fine plantation in the parish of Tensas, which he had leased that year at a moderate price; that he was to pay in corn to be raised on the place; that he had a large crop growing upon the place—about three hundred acres in cotton, and, besides, one hundred and twenty acres in broom corn and one hundred and eighty acres in corn; that the season was propitious and that his crop bade fair to yield abundantly; that it was considered the finest crop that year in the neighborhood. His prospects were fair and flattering. The prices that season were inviting, and he was justified in anticipating large profits from his labor and industry. With the means he had a right, under these circumstances, to expect from the proceeds of his crops, what he thought to be his indebtedness to Ober, Atwater & Co. might readily have been paid off. He rested satisfied with the state in which he believed his indebtedness to them existed, namely: that he had paid them \$10,000 by the sale of the Live Oak plantation, leaving a balance of something less than that sum due them by note. It would seem, then, that he had no interest in entering into the compromise.

On the other hand, Ober, Atwater & Co., without sufficient prudence, if not unjustifiably, took out an attachment, and caused his entire crop, work animals, agricultural implements, and all his appliances for carrying on a prosperous and promising business to be

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seized and taken out of his possession and control, and subjected to the management of the sheriff and such keepers as he might appoint. The ruinous and disastrous consequences resulting to Packard from this act is abundantly shown by the evidence. A general demoralization at once took place among the laborers on the plantation. They became alarmed for fear of losing their wages, and refused to continue their labor. Two weeks intervened, during which, in the height of the cotton picking season, nothing was done towards gathering the crops. Laborers could only be induced to return upon assurances of higher wages promptly paid. It is shown that cotton in the seed stored in outhouses was stolen; that a system of pillaging took place, intruders from the adjoining plantations going on the place and picking and carrying off cotton; that a large quantity of the broom corn was damaged from lying on the ground after being cut and not attended to; that other portions of it were awkwardly handled and packed, and turned out to be of little or no value.

There is not within the large scope of the testimony in this record anything to sustain the opinion that there was any intention on the part of John Q. Packard to remove from the State. On the contrary, the evidence shows that he was an ardent cultivator of cotton and wedded to the business of planting, and that his declarations were frequent that he had identified himself with the State and meant to remain in it. And his acts sustained these declarations. It is shown that the defendants proceeded solely on the statements made to them by a brother and a nephew of the plaintiff, to the effect that John Q. Packard was about to leave the State. These statements, it is safe to believe, were utterly without foundation, and proceeded from revengeful and vindictive feelings entertained by the brother of J. Q. Packard towards him. A short time before the attachment was taken out, this brother was heard to express feelings of this kind toward J. Q. Packard, and to threaten revenge. The record abounds with testimony which gives to this brother a very unenviable reputation for truth, sobriety and brotherly affection. A man having the proper regard for the proprieties of life would remain silent with regard to a brother's wrong-doing, rather than blazon it forth to the world gratuitously; and the man who, uncalled for, appears to accuse his brother in order to injure him in the estimation of others, should be entitled to but little credit. The defendants, without knowledge other than that derived from the source from whence it came, should have hesitated before resorting to the harsh remedy they adopted.

When the question of the legality of the attachment came up before the court the defendants, no doubt, had misgivings of the result of that investigation; a heavy liability was to fall upon them if it should be

determined that their attachment had been wrongfully taken out. It was important to avoid the risk of such a responsibility. It was an object with them also to annul the contract in regard to the Live Oak plantation, for if it should be decided to be a sale and it merged a large part of Packard's debt, they were to have on their hands a property burdened with a mortgage amounting to over seven thousand dollars, which they had assumed to pay; and from the depressed value of lands about that time the Live Oak plantation was not likely to be available as a means of readily raising money. This state of things, we think, did exist at the time the compromise was made, and from it we conclude the defendants felt a strong interest in entering into it. It was then a primary object with them to impress the plaintiff with the belief that the deed of the Live Oak plantation had never been signed and accepted, and therefore there was no payment of the ten thousand dollars of the plaintiff's debt to them. Accordingly we find Ober going to the office of Packard's counsel to inform him of the non-execution of the deed and of the employment by Ober, Atwater & Co. of experts to compare Janney's real signature with that to the deed, and of the result of their examination; and also that Janney denied that he ever signed the deed at all. Added to this it may be stated, what we have before noticed, that a day or two afterwards, Janney himself said to the counsel of Packard that he had not signed the deed, and that he would so swear. The unexecuted act called a "rescission," to which we have before referred, drawn up by the defendants' attorney, shows the solicitude with which they desired to annul the deed of the Live Oak plantation, to get clear of it as owners and to stand merely as mortgagees of that property. It is clear that the defendants' counsel was satisfied that it would be to the interests of his clients to compromise and that he advised it.

From the entire range of facts and circumstances that come into view in this litigation, we think it sufficiently clear that Ober, Atwater & Co. had strong inducements to effect a compromise, and in order to carry out that purpose they were mainly instrumental in impressing upon the mind of the plaintiff's counsel, and also upon that of the plaintiff himself, the belief that the deed of sale of the Live Oak plantation had not been signed by the defendants' agent. We conclude that Packard, in entering into the compromise, acted under an error of fact bearing upon the principal cause of the agreement, and therefore that the act of compromise is null and void. C. C. 1824; 4 La. 347; C. C. 1827, 3079; 10 Rob. 65; 15 An. 268.

As the effect of the annulment of the compromise made by the parties is to restore things to the condition they were in previous to that time, we think the defendants, Ober, Atwater & Co., are entitled

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to credit for the amount of the note for eight thousand three hundred and three dollars and forty-nine cents, which according to the plaintiff's own showing was given by him to the defendants in the spring of 1867 on a settlement of their business, and which note, by his own allegations, together with the sale to them of the Live Oak plantation, settled his indebtedness to the defendants. We are not satisfied from the record how or when this note was paid. If it were unpaid at the time of the compromise it must remain unpaid yet. It is equally so if it entered into the compromise, that being declared void.

The defendants having assumed to discharge the unpaid balance of the price of the Live Oak plantation due by Packard to Johnson from whom he bought, viz., the sum of seven thousand five hundred dollars, they should be indemnified against their liability to pay that balance. In these respects the judgment of the lower court should be amended.

It is therefore ordered that our former decree be set aside, the defendants Ober, Atwater & Co. be and are hereby decreed to be entitled to a credit of eight thousand three hundred and three dollars and forty-nine cents upon the judgments rendered against them in these consolidated cases by the district court, to date and take effect from the twentieth of June, 1870, the day on which judgment was rendered against them in said court. It is further ordered that the said defendants be and they are hereby authorized to retain in their hands out of the amount of the judgment now finally decreed against them the sum of seven thousand five hundred dollars, for and during the space of ninety days as an indemnity to them against the aforesaid mortgage on the Live Oak plantation; and to the extent of that sum (seven thousand five hundred dollars), execution is suspended for the said space of ninety days. And, if within that time, the said defendants shall not have filed in the Sixth District Court of New Orleans in this suit, sufficient legal evidence of their having paid and satisfied said mortgage in full or been satisfied by the sale of the Live Oak plantation, then and in that case execution to issue in favor of plaintiff for the said sum of seven thousand five hundred dollars. It is finally ordered that as thus amended the judgment of the district court be affirmed, the plaintiff and appellee paying costs of this appeal.

LUDELING, C. J. I adhere to the opinion and decree heretofore rendered. The error complained of is an error as to what evidence or proof could be adduced, and not an error of fact bearing upon the principal object of the compromise.

Mr. Justice Wyly adheres to the original decree delivered in this case.

Mrs. Azema Leigh v. Knickerbocker Life Insurance Company of New York.

No. 3374.

MRS. AZEMA LEIGH, Widow, v. KNICKERBOCKER LIFE INSURANCE COMPANY, of New York.

The following note was given to defendants for a part of the premium due on renewal for a policy of insurance: "New York, May 7, 1870. Three months after date, *without grace*, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and twenty-nine dollars and interest, value received in premium on policy No. 2051 (37,593), which policy is to be void in case this note is not paid *at maturity according to contract in said policy*."

The question is whether this note was payable at noon, on the eighth of August, 1870, (the seventh being Sunday), or during business hours.

The portions of the policy relied on by the defendants as fixing the maturity of said note are the following: "And the omission to pay the said annual premium on or before twelve o'clock noon, on the day or days above mentioned for the payment thereof, or failure to pay at maturity any note (other than the annual premium note) given for premium interest or other obligation on this policy, shall then and thereafter cause said policy to be void, without notice to any party or parties interested herein."

The insured paid a portion of the premiums in cash and for the balance gave three notes, one of which is above transcribed. The receipt of the company runs thus: "Renewal No. 69,003. New York, May 7, 1870, received of Azema Leigh seven hundred and ninety-eight dollars and eighty cents in cash, and notes (exclusive of interest as stated in the margin hereof), which amount, *if said notes are duly paid on or before the maturity thereof*, will complete the payment of the premium necessary to continue policy No. 2051 in force until the seventh of May, 1871, at noon, and in case said notes, or either of them, shall not be paid *on or before the maturity thereof*, said policy shall at once become void without notice," etc.

In the opinion of the court the notes referred to in the policy as being payable at noon, are the annual premium notes, which are due on the seventh of May of each year, and not the notes given for a part of the premium and falling due at such dates as may be agreed upon at the time. Whenever the words "at noon" are used in the policy, it is in immediate connection with the words "seventh of May." The note itself and the receipt contain the stipulation in general terms, that, "if not paid at maturity," the policy will be void. The expression or words at the end of the note, "*according to contract in said policy*," must be construed as referring to the effect of non-payment at maturity—the contract in that respect—rather than the *hour* at which the note must be paid.

The words "at maturity" refer to and include the whole day unless specially and distinctly limited to a certain hour of the day. The expression, "three months after date *without grace*," means that the note is to be paid on the last day of the three months, without the usual three days of grace. No reference is made to *hours*. The *annual* payments were to be made by *noon* of the day, because probably the policy was fixed to *expire at noon*; but the notes for the stipulated instalments of the *extended* premium were taken as an accommodation to the party, and were to be paid at maturity in the ordinary signification of the term.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

HOWELL, J. The principal question in this case is whether the note given for a part of the premium was payable at noon on the eighth of August, 1870, or during business hours. It is in the following words:

" \$129.

NEW YORK, May 7, 1870.

"Three months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and

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twenty-nine dollars and interest, value received in premium on policy No. 2051 (37,593), which policy is to be void in case this note is not paid at maturity, according to contract in said policy."

The seventh of August being Sunday the note was not due until Monday, the eighth. The insured died at one o'clock on said date—eighth August, 1870. The portions of the policy relied on by the defendants as fixing the maturity of said note are the following: "And the omission to pay the said annual premium on or before twelve o'clock noon, on the day or days above mentioned for the payment thereof, or failure to pay at maturity any note (other than the annual premium note) given for premium, interest or other obligation on this policy, shall then and thereafter cause said policy to be void, without notice to any party or parties interested herein."

"CONDITIONS OF INSURANCE.

"*First*—The premium must always be paid on or before twelve o'clock noon of the day upon which it falls due, and the party paying should be careful to obtain a receipt therefor, signed by the president and secretary, according to the terms of the charter."

In the first part of the policy it is stated that in consideration of the premium of \$798 80 "paid by Azema Leigh, and of nine further annual payments of a like sum to be made on or before the seventh day of May, in each year, until the last payment is completed on May 7, 1878, and of the interest annually on all premium notes on this policy, on or before the seventh day of May, at noon in each year, until the said notes are paid," etc.

The policy was dated seventh May, 1869, and was to continue for the time of the natural life of the insured on the stipulated conditions. In May, 1870, the premium for the ensuing year was settled by the payment of one-fourth of one-half thereof in cash and the balance in three notes of \$129 each at three, six and nine months. The other half of the premium was constituted a loan on which the interest was included in the settlement. The receipt contemplated by the policy was taken and is in the following words:

"Renewal No. 69,003.

NEW YORK, May 7, 1870.

"Received of Azema Leigh seven hundred and ninety-eight dollars and eighty cents in cash and notes (exclusive of interest), as stated in the margin hereof, which amount, if said notes are duly paid on or before the maturity thereof, will complete the payment of the premium necessary to continue policy No. 2051 in force until the seventh day of May, 1871, at noon; and in case said notes, or either of them shall not be paid, on or before the maturity thereof, said policy shall at once become void, without notice," etc.

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It is the first of those three notes that is involved in this controversy.

In our opinion the notes, referred to in the policy as being payable at noon, are those which are due on seventh May, of each year, and not the notes given for a part of the premium and falling due at such dates as may be agreed on at the time. Wherever the words "at noon" are used in the policy, it is in immediate connection with the words "seventh of May." The note itself and the receipt contain the stipulation, in general terms, that if "not paid at maturity" the policy will be void. The expression or words at the end of the note, "according to contract in said policy," must be construed as referring to the effect of nonpayment at maturity—the contract in that respect—rather than to the hour at which the note must be paid. The words "at maturity" refer to and include the whole day, unless specially and distinctly limited to a certain hour of the day. We find no words in the note itself, or the policy, declaring that such a note shall mature at noon on a particular day. It says expressly, "three months after date, without grace." This means that the note is to be paid on the last day of the three months, without the usual three days of grace. No reference is made to hours. The annual payments were to be made by noon of the day, because, probably, the policy was fixed to expire at noon; but the notes for the stipulated instalments of the extended premium were taken as an accommodation to the party, and were to be paid at maturity, in the ordinary signification of the term.

Judgment affirmed.

No. 5209.

MARY MALADY v. WILLIAM MALADY, et al.

The judge *a quo* erred in making absolute the rule for the appointment of a receiver in this case. The petition on rule does not aver a necessity for it, nor any loss, injury or damage likely to arise to plaintiff, if it should not be done. There is no reason why the entire revenues of all the property belonging to the litigants should be taken possession of by a receiver, on the ground that the plaintiff owns one-fourth of it, when said plaintiff fails to allege even a cause for such appointment.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Walter H. Rogers*, for plaintiff and appellee. *E. T. Merrick, Race & Foster*, for defendants and appellants.

TALIAFERRO, J. The defendants appeal from the following interlocutory orders rendered by the lower court during the trial of this case, viz:

First—The order of thirtieth January, for a sale of the property.

Second—Dismissing the defendants rule to rescind the order of sale.

Third—Dismissing the opposition to the report of experts.

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Fourth—The appointment of the sheriff to receive the rents and revenues of the property.

In May, 1873, a decree of this court was rendered decreeing the plaintiff entitled to one-fourth of certain real estate standing in the name of Mary B. Caldwell, one of the defendants. Predicated upon that final decree, establishing the rights of the parties to the property that had been the subject of litigation, the plaintiff instituted proceedings in the Fourth District Court to cause a partition to be made. An order was rendered appointing experts to examine and report whether the property was susceptible of division in kind without injury to the owners. On the part of the plaintiff there appears to have been a disposition to push forward proceedings at a speed scarcely sanctioned by legal rules, and on the part of the defendants a willingness to submit to the inevitable law's delay. No notice, it seems, was served upon the defendants of the filing of the report of the experts, according to article 456 of the Code of Practice. The defendants, after the notice required by that article, which they are entitled to but which was not given, had ten days within which to file their opposition. C. P. 457. They filed an opposition, however, on the ninth day after the filing of the report; but before this opposition was filed the court rendered an *ex parte* order approving and homologating the report of the experts. The opposition was filed on the twenty-sixth of January. On the same day the plaintiff filed a petition for a sale of the property for cash, alleging that the report of the experts had been homologated. On the thirtieth of January an *ex parte* order was rendered on this petition for a sale of the property for cash, in conformity with the report of the experts. The defendants then took a rule on the plaintiff to have this order of sale rescinded, on the ground that it had been improvidently rendered. Pending this rule before the court the defendants, on the fourteenth February, introduced two witnesses to testify in regard to the practicability of a division of the property in kind. These witnesses testified that the property is susceptible of a division in kind, and gave their reasons for this opinion and presented their programme upon which, in their view of the case, a division in kind can be made. The rule to rescind was dismissed on the second of March, as was also the opposition of defendants to the homologation of the report of experts.

The plaintiff proceeded by rule on the tenth of January to have the civil sheriff appointed receiver, to collect rents and revenues of all property she claimed to have an interest in. Issue was joined on this rule denying the right of the plaintiff to have a receiver appointed. The court made the rule absolute on the twenty-ninth of January, and appointed the sheriff keeper as prayed for by the plaintiff. The peti-

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tion or rule for this appointment does not allege any reason for the appointment of a receiver. It does not aver a necessity for it; nor loss, injury or damage likely to arise to the plaintiff, if it should not be done. We can see no good reason why the entire revenues of all the property shall be taken possession of by the sheriff on the ground that the plaintiff owns one-fourth of it, when she fails to allege even a cause for such appointment. We think the court erred in making the rule absolute. 11 R. 433 and 4 An. 456.

We think all the foregoing orders appealed from and numbered from one to four inclusive, were irregularly and improperly rendered, and it is now ordered that they be annulled and set aside. It is further ordered that the report of the experts appointed to examine and report whether the property owned in common by the parties to this suit is susceptible of division in kind or not, be approved and homologated, and it is further ordered that the said property be sold and the proceeds partitioned between the parties upon the basis of their respective shares and interests in the property, the sale to be made in conformity with law and this order.

It is lastly ordered that this case be remanded to the court of the first instance for the purpose of rendering all such ulterior orders and taking all such further proceedings herein as may be necessary to effect and complete the said partition, the plaintiff and appellee paying costs of this appeal.

Rehearing refused.

No. 5093.

MRS. ELISE LABAUVE v. MRS. EMILY WOOLFOLK et al.

Nothing prevents the owners of property in common from exercising their rights of partition, and it is not seen how the proceedings complained of in this case by plaintiff can injure her right of mortgage on the property which the owners have taken measures to partition, as her judicial mortgage will follow the property or its proceeds.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *Cole, J. Barrow & Pope, Herron and Gallagher*, for plaintiff and appellant. *Samuel Mathews, E. T. Merrick, Race & Foster*, for defendants and appellees.

TALIAFERRO, J. The plaintiff alleges that her late husband, Zenon Labauve, was a judgment creditor of Mrs. Emily Woolfolk in large sums, as shown by three several judgments duly recorded and being judicial mortgage upon her property. As survivor in community and as usufructuary the plaintiff sets up her right to bring this action, the object of which is to defeat what she alleges to be a scheme concocted by and between Mrs. Woolfolk and her children, who are named in the

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petition, to injure and destroy the judgment claims and mortgage rights of the plaintiff, by using the machinery of the courts to effect a partition and sale of all the property upon which her mortgage rights bear and are secure, by a fraudulent and fictitious assignment on the part of Mrs. Woolfolk to her children of the right of usufruct of one-half of said property, and by collusively and fraudulently permitting judgments to be rendered against her, and under them to allow her usufructuary rights on the property to be sold, and directly and indirectly to be purchased by her son, Austin Woolfolk. The plaintiff prays judgment recognizing her claims under and by virtue of the judgments and judicial mortgages resulting from the same, as set forth in her petition; that the judicial mortgages she claims as bearing on all the real property of Emily Woolfolk be decreed to have priority over any right, claim or mortgage set up in favor of the parties to the said act of partition; that the judgment rendered by the parish court on the sixteenth September, 1869, decreeing the said partition, be decreed null and without effect; that the notarial act, of date of the tenth February, 1869, before Austin Hunt, be declared null so far as it may affect the rights of the petitioner; that the judgments referred to, to wit: The judgment in favor of Austin Woolfolk, No. 420, and that in favor of Thomas Patrick, No. 421, and the sales made under these judgments be declared simulated and fraudulent, and null and void, as being injurious to the plaintiff's rights and designed to defraud her of her just claims against the said property. She finally prays that an injunction be granted in her favor restraining and prohibiting all the aforesaid parties from taking further proceedings in regard to a sale of the property as advertised, until the whole can be inquired into legally after due citation, and on the trial of the injunction that it be made perpetual, and for costs, etc.

The defendants filed a peremptory exception to the plaintiff's action, taking the ground:

First—That plaintiff is not party to any of the judgments which she prays to have annulled, and has no legal right to institute this action of nullity.

Second—That this court (the district court in which the action was brought), is without jurisdiction to annul a judgment of the parish court, or to rank or class the claim of the plaintiff in the distribution of the proceeds of the partition sale which may be made in that case.

Third—In bar of the plaintiff's action the prescription of one year is pleaded, whether the action is to be regarded as revocatory or one to annul.

The defendants pray for a dissolution of the injunction and for damages. The exception was sustained. The plea of prescription was

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held good and the suit dismissed. The injunction was dissolved with five hundred and fifty dollars damages, for attorney's fees and for costs of readvertising the sale of the property enjoined, and an order rendered that the auctioneer proceed with the sale of it.

From this judgment the plaintiff appeals. We think the judgment properly rendered. Nothing prevents owners of property in common from exercising their right of partition, and we do not see how the proceedings complained of by the plaintiff can impair her right of mortgage on the property which the owners have taken measures to partition, as her judicial mortgage will follow the property or its proceeds.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 3267.

EMMA J. THACKER v. THOMAS DUNN.

It is clearly shown in this case that there has been a great discrepancy between the amounts of revenues and expenditures in the administration of the minor's estate. The excess of the expenditures should fall upon the defendant. As he assumed the functions and discharged the duties belonging of right only to a tutor, and had exclusive control of the person of the minor, of his property and its revenues, so he must be held to the responsibilities of a tutor.

The court below erred in not overruling the exception to its jurisdiction in regard to annulling the mortgage granted by plaintiff to defendant. The defendant filed an account as administrator. That instrument has also the character of a tutorship account. The account shows a considerable balance against the minor, the present plaintiff, who, at the instance of the defendant, executed a mortgage on her property to secure the payment of that balance.

The administrator's account was homologated by order of the judge *a quo*. The mortgage has for its basis the account so homologated. That the judge *a quo* has jurisdiction of the suit to annul the amount and the order homologating it, there can be no doubt. The annulment of the account and judgment of homologation carries with it necessarily the annulment of the mortgage, because it expunges the amount of the assumed indebtedness for which the mortgage was given, thereby sweeping away the basis upon which it rested.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Fellows & Mills*, for plaintiff and appellee. *T. Gilmore & Sons*, for defendant and appellant.

TALIAFERRO, J. This action is brought to annul a mortgage executed by the plaintiff, as she alleges, through error on her part and fraud on the part of the defendant, to secure an amount of indebtedness pretended by him to have arisen from his administration of the succession of the plaintiff's mother, and presented by the defendant's account of that administration, homologated by judgment of the Second District Court of New Orleans. The plaintiff prays also the annulment of said account of administration, and the judgment homolo-

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gating the same. The answer is a general denial. The defendant specially denies that he was ever the tutor to the plaintiff during her minority, or that he is liable to her in that capacity. There was an exception taken to the jurisdiction of the court, which was sustained as to the act of mortgage. The court rendered judgment annulling the administrator's account and the order homologating it, and ordered the administrator to file within twenty days a full and complete account of his administration of the said estate. From this judgment the defendant appeals.

The plaintiff was left at an early age, by the death of her father and mother, without any known relatives. At the instance of a priest who had been the spiritual adviser of her mother, and by a promise made to her father by the defendant, he took upon himself the administration of the estate of Mary Thacker. It seems that a man named Finch had been appointed tutor to the minor, and that she lived a year or two in his house; but beyond signing his name a few times to instruments presented to him, we do not find that he ever did any act in the capacity of tutor.

The entire control and management of all the property of the succession of Mary Thacker, the residuum of which belonged to the minor, was in the hands of the defendant as administrator; that the minor went to live with him; it appears that he had the personal care of her and superintended her education; that he settled the debts of the succession, paying some of them out of his own means, and preserving for the minor a house and lot in the city of New Orleans, worth some five or six thousand dollars, the rent of which he collected. In the year 1865, the minor, at the age of about fourteen years, was upon advice of her friends sent by the defendant to a convent school in Kentucky, where she remained until she graduated in 1869, and returned to New Orleans in July of that year. In 1870 she was emancipated, and in February following the defendant filed his final account of administration, which was presented to the plaintiff, and after citation to her was homologated. It showed a balance against the plaintiff of \$3107 81. For this sum she executed the mortgage which she now seeks to annul in this action.

It is announced on the part of the defendant that he has no other account to render than the one at first presented, and on the part of the plaintiff it is suggested that a final judgment may properly be rendered by this court upon the evidence and data before it.

We incline to think the litigation may be terminated here, and proceed to examine the evidence with that view. The account of the administrator gives with precision the various items of expenses incurred for the minor's education and a detailed statement of her

revenues arising from rents. It is chiefly to the charges of the administrator of expenses incurred for the maintenance, clothing and education of the minor that his account is sought to be annulled, and the ground taken is that the expenses greatly exceed the revenues, and the administrator is held liable as the tutor of the minor, and so held to account, and therefore is not entitled to credit for any expenditures on the minor's account above the amount of her revenues, which were amply sufficient for all the purposes of the expenditure necessary on her account. The plaintiff's counsel have with much industry presented a tabulated statement formed from the accounts, showing the amounts of revenues and expenditures, by which it would appear that the latter have considerably exceeded the former. The deductions of the excess of expenditures over the revenues being made from the amount of balance against the administrator, as stated in his account, to wit: \$3107 84, there appears a balance in favor of the defendant of only \$918 30, to which amount the plaintiff asks that his demand against her be reduced. We see no objection to this reduction. It is clearly shown that there has been a great discrepancy between the amounts of revenues and expenditures, and we think the excess of the expenditures should fall upon the defendant. As he assumed the functions and discharged the duties belonging of right only to a tutor, and had exclusive control of the person of the minor and of her property and its revenues, so he must be held to the responsibilities of a tutor.

The court below, we think, should have overruled the exception to its jurisdiction in regard to the annulment of the mortgage. The defendant filed an account as administrator. That instrument has also the character of a tutorship account. The account shows a considerable balance against the minor, the present plaintiff, who, at the instance of defendant, executed a mortgage on her property to secure the payment of that balance. The administrator's account was homologated by order of the judge *a quo*. The mortgage has for its basis the account so homologated. That the judge *a quo* has jurisdiction of the suit to annul the account and the order homologating it, there can be no doubt. The annulment of the account and judgment of homologation carries with it necessarily the annulment of the mortgage, because it expunges the amount of the assumed indebtedness for which the mortgage was given, thereby sweeping away the basis upon which it rested. *Sublato fundamento cadit opus*.

It is therefore ordered that the judgment of the district court be annulled and avoided. It is further ordered that the account rendered by the administrator be amended, so as to reduce the indebtedness thereupon shown in favor of the defendant from \$3107 84 to \$918, the amount now fixed as due by the plaintiff to the defendant; that the

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note and mortgage executed by the plaintiff to secure the payment of the said sum of \$3107 84 be annulled, and the same are declared void and without effect. It is now ordered that the said account, as amended, be homologated and confirmed. It is further ordered that the plaintiff pay costs in the court below, the defendant and appellee paying costs of this appeal.

Rehearing refused.

No. 3357.

MRS. ELIZABETH GEORGE, Widow and Tutrix, v. CHARLES CAMPBELL—
MAGEE & KNEASS, Interveners.

The plaintiff, not having tendered to the defendant the sum of money conceded to have been paid by the latter for taxes on certain property which she claims to be reconveyed to her, ought not to recover judgment against him for damages arising from his refusal to make the reconveyance to which plaintiff is entitled.

The claim of the intervenors predicated on the allegation that George, the husband of the plaintiff, bought the property which is sought to be made the object of the reconveyance, with money belonging to them, and which he employed for their benefit as their agent, can not be maintained. George was not the agent of the intervenors before the war of the rebellion, and was not acting as such at the time it occurred. They could not have appointed him afterwards, during the war, because they were citizens of Pennsylvania, a loyal State.

But whether the property in question was bought or not with the money of the intervenors is immaterial. If George had stolen the money from the intervenors, they could not have become the owners of the property acquired therewith by him. Besides, they can not establish title to immovable property by parol, and they have no written evidence in support of their pretensions.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. T. Merrick, Race & Foster*, for plaintiff and appellee. *Gibson & Austin*, for defendants and appellants. *Labatt & Aroni*, for intervenors and appellants.

WYLY, J. In May, 1862, John R. George, whose succession the plaintiff represents, conveyed the lot of ground on Prytania street, which he acquired from John Holmes, to the defendant, Charles Campbell.

The plaintiff, alleging that this sale was a mere simulation, intended to protect the property of George during his absence in the Confederacy, which occurred immediately thereafter, sues for the property, and also for \$1000 damages, resulting from the refusal of the defendant to reconvey the same pursuant to the agreement at the time of said transfer.

In answer to the petition, the defendant admitted having possession of the property, and averred his willingness to turn over the same to the legal representatives of the succession of John R. George, upon their reimbursing him the amount he had advanced for taxes and

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necessary expenses, amounting to \$667. He also answered the interrogatories or facts and articles propounded by the plaintiff, admitting that the \$4500 paid for the property had been returned to him by George two days after the sale, and that the understanding was that the property was to be reconveyed by him to George. There was much irrelevant matter in the answers which was improperly inserted therein.

After the issue was made up and the defendant had answered the interrogatories or facts and articles, Magee & Kneass intervened, setting up title to the property in controversy on the ground that John R. George was their agent, and the funds with which he acquired said property belonged to them.

The court gave judgment in favor of plaintiff for the property, and also condemned the defendant to pay \$1000 damages. A remittance of \$270 37, the amount of taxes conceded to have been paid by the defendant, was entered in reduction of the judgment for \$1000.

The defendant and intervenors have appealed.

The plaintiff not having tendered to the defendant the sum of money conceded to have been paid by him for taxes, ought not to recover judgment against him for damages arising from his refusal to make the reconveyance. In other respects we regard the judgment as correct.

John R. George was not the agent of the intervenors appointed before the war of the rebellion, and acting as such at the time it occurred. They could not have appointed him afterwards because they were citizens of Pennsylvania, a loyal State.

We are not satisfied that the funds actually employed by George in purchasing the property in question, in February, 1862, belonged to the intervenors. But whether they did or not is immaterial. If George had stolen the money from the intervenors, they would not have become the owners of the property acquired therewith by him. Besides, in this controversy the intervenors can not establish title to immovable property by parol, and they have no written evidence in support of their pretensions.

It is therefore ordered that the judgment herein be amended by striking out that part thereof decreeing plaintiff \$1000 damages, and by providing that the defendant be not required to execute the conveyance to the plaintiff until the latter pays over to him \$270 37, the amount of taxes paid by him; and as thus amended, it is ordered that the judgment be affirmed, appellee and the intervenors paying costs of appeal.

Rehearing refused.

Carroll & Co. v. New Orleans, Jackson and Great Northern Railroad Company.

Nos. 3281, 3282.

D. R. CARROLL & Co. v. NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY, and ALCUS, SCHERCK & Co. v. The Same. Consolidated.

The growers of certain cotton shipped the same to the respective plaintiffs, by the New Orleans, Jackson and Great Northern Railroad. The cotton was destroyed by fire while in one of the railroad company's cars. The insurance company in which it was insured paid the loss, and the question is, whether the insurance company can recover its loss from the railroad company? It must be answered negatively.

There was no contract between the two companies; consequently there was no obligation from the one to the other. There was no conventional subrogation from the assured to the assurers, and there was certainly no legal subrogation by which payment by the one entitled them to payment from the other.

The insurance company paid the loss for which they received a premium for insuring against, to the persons who suffered the same. As there was no obligation between them and the railroad company, and as no obligation existed towards them from the railroad company, they have no claim against it.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Albert Voorhies*, for plaintiffs and appellees. *L. E. Simonds, Hays & New*, for defendant and appellant.

MORGAN, J. The party in interest in both these suits is the Merchants' Insurance Company. The growers of certain cotton shipped the same to the respective plaintiffs by the New Orleans, Jackson and Great Northern Railroad. Its loss by fire during transit was assured against in the Merchants' Insurance Company. It was destroyed by fire while in one of the railroad company's cars. The insurance company paid the loss. The question here is, whether the insurance company can recover its loss from the railroad company? We think not. There was no contract between the two companies; consequently there was no obligation from the one to the other. There was no conventional subrogation from the assured to the assurers, and there was certainly no legal subrogation by which payment by the one entitled them to payment from the other. The insurance company paid the loss for which they received a premium for insuring against to the persons who suffered the same. As there was no contract between it and the railroad company, and as no obligation existed towards them from the railroad company, they have no claim against it.

It is therefore ordered, adjudged and decreed that the judgment of the district court in both cases be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

TALIAFERRO, J., *dissenting*. These suits were brought against the railroad company to make them liable, as common carriers, for certain cottons consigned to the plaintiffs as factors of the owners of the

cotton, which was taken upon their cars at station No. 12, under contract of affreightment to be delivered in New Orleans, but which the company failed to deliver. The cotton was insured at the office of the Merchants' Insurance Company. The loss of the cotton being ascertained, the consignees applied to the company under the contract of insurance and were paid the value of the cotton, and the money was paid over to the owners. It seems that the names of the parties appearing in these suits as plaintiffs, are used by their consent by the Merchants' Insurance Company, the real plaintiff in both cases. The defense is:

First—That the cotton was burned by unavoidable accident in spite of due care and diligence on the part of defendant.

Second—And even if unavoidable accident be not established by defendant's evidence, the burden of proof is on the insurance company to show negligence, inasmuch as its claim is not for non-delivery under a contract of affreightment, but is the claim of a third party claiming damages resulting from the fault of the defendant.

Third—The real owners of the cotton, the planters, have received from the insurance company, under its contract with them, the value of the cotton, and have no interest in the suit.

There was judgment in favor of the plaintiffs, and the defendants have appealed.

The cotton, it appears, was properly stored at Brookhaven in a close box car, having no other openings than the doors which were locked, and remained so until the fire burst forth while the train was on the side track at Magnolia. The defendants contend that however the fire may have originated it seems to have been an unavoidable accident. It is clear that the destruction of the cotton by fire under the circumstances shown, does not relieve the railroad company from liability to pay for it.

The defendant contends that no conventional subrogation to the rights of the owner of the cotton is alleged or shown on behalf of the insurance company; that the insurance company was not bound with or for the defendant, in the sense of the Civil Code, nor had an interest in discharging the debt.

The cotton was insured against fire. It was destroyed by fire. The railroad company was principally bound. Its liability was *prima facie* fixed and could only be avoided by showing affirmatively on its part that the accident and loss resulted from *vis major*. In every other contingency the law would attribute the loss to negligence on the part of the carriers, or to events which it was in their power, or that of their agents to prevent. The insurance company was bound to make good a loss arising from a casualty against which it had expressly

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insured the owners. It chose to pay the indemnity and look to the common carriers for reimbursement. If the latter were bound to make good the loss, what difference to them whether they paid the owners or the insurers? In a suit by the insurers against the carriers, the latter could set up all the defenses against the insurers which they might have made in a suit against them by the owners. Being bound to the owners to indemnify them for the loss that occurred, and having discharged that obligation I am clearly of the opinion the insurance company stands subrogated by law to all the rights of the owners against the carriers, as they certainly are upon general principles of equity. Civil Code, articles 2160, 2161.

WYLY, J. I concur in this dissenting opinion.

Rehearing refused.

No. 3375.

HENRY F. WADE v. DAVID W. EAMES.

Plaintiff, revoking the donation which he made to his wife of a certain piece of property, seeks to recover possession of said property from defendant, whose title is derived from plaintiff's wife under the donation aforesaid.

It appears that Mrs. Wade desired to donate the property in question, thus donated to her, to her daughter, Mrs. Eames, "as an extra portion over and above her legitimate share in the succession of said donor," estimating it at \$7000, and to secure the title, it was specially stipulated in the act, "that the said donor binds herself and her heirs to warrant and forever defend the said property against all legal claims and demands whatsoever." To this act the plaintiff was a party, approving of it and authorizing his wife. He is therefore, estopped from disputing the title of defendant.

Besides, the prescription of ten years invoked by defendant, is a complete bar to the action.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Roselius & Philips*, for plaintiff and appellant. *Fellows & Mills*, for defendant and appellee. *T. Gilmore, Cotton & Levy*, for defendants, called in warranty.

WYLY, J. On the seventeenth of May, 1860, the plaintiff donated a certain piece of property to his wife, and on the same day she donated it to the wife of the defendant, who was her daughter by a previous marriage. Subsequently, defendant's wife died, leaving a child who inherited this property. The child dying, the defendant inherited it. Subsequently, the wife of the plaintiff died; and then the plaintiff made a notarial act revoking the donation of the property to his wife and sued the defendant to recover possession thereof. The court gave judgment for the defendant and the plaintiff appeals.

It appears that Mrs. Wade desired to donate the property in question to her daughter, Mrs. Eames, "as an extra portion over and above her legitimate share in the succession of said donor," estimating it at

\$7000. And to secure the title it was specially stipulated in the act, that "the said donor binds herself and her heirs to warrant and forever defend the said property against all legal claims and demands whatsoever."

To this act the plaintiff was a party authorizing and assisting his wife.

We think the plaintiff is estopped from disputing the title of the defendant. Valuable improvements have been erected and taxes paid on the faith of the title which Mrs. Wade passed with full warranty, and the plaintiff was a party to the act authorizing and approving of it. It would be a fraud to allow him now to recover the property. Besides, the prescription of ten years invoked by the defendant, is a complete bar to the action.

Judgment affirmed.

No. 4823.

SUCCESSION OF THOMAS F. OSTRANDER.

The prescription of one year was pleaded in bar to the opposition made to the administrator's tableau, on the ground of usurious interest being charged on certain notes placed on said tableau. The plea should have been entertained.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Kennard, Howe & Prentiss*, for the administrator, appellant. *J. S. Whitaker*, for Mrs. Ostrander, opponent and appellee.

MORGAN, J. The administrator has appealed from the judgment rendered in opposition to his account by Mrs. Ostrander.

His counsel were allowed on his tableau \$250. The Judge reduced them to \$150. Of this he complains.

The succession consisted of real estate, estimated on the inventory, at \$3500, and subsequently at \$4250. It sold, however, for \$2925. So far as the record discloses, the services rendered were :

First—Opening the succession.

Second—Causing an inventory to be taken and having the same homologated.

Third—Getting an order of sale.

Fourth—Taking a rule on the purchaser to comply with his bid.

Fifth—Filing an account and defending the same.

Considering the value of the succession it seems to us that \$150 is a reasonable fee.

It seems that the administrator is the owner of two promissory notes for \$750 each, bearing mortgage and vendor's privilege upon the property left by the deceased. He places himself on the tableau for the

 Succession of Ostrander.

amount of these notes with the interest due thereon, \$2273 64. Opponent avers that usurious interest has been charged on these notes, which would reduce them to \$1100. The district judge found that usurious interest had been charged and therefore, rejected the entire interest. The interest was paid during Ostrander's life. He pleads the prescription of one year against the opposition. The plea should have been sustained. See *Johnson v. Phillips*, 24 An. 156. *McCracken v. Wells*, 25 An.

In his brief, counsel for opponent objects to the privilege granted by judgment for taxes due. But he has not appealed from the judgment or any part thereof, nor has he asked, in answer to the administrator's appeal, that the judgment be amended. We can, therefore, only pass upon the complaint of the appellant.

It is, therefore, ordered, adjudged and decreed that that portion of the judgment of the district court which fixes the fee of the counsel of the administrator be affirmed. And it is further decreed that that portion of the judgment which disallows the interest on the notes held by the administrator, be avoided, annulled and reversed, and that the amount placed on the tableau by him be approved and homologated. The costs to be paid by the succession.

Rehearing refused.

 No. 3381.

JOHN COLEMAN & Co. v. THE CITY OF NEW ORLEANS.

The cession to the United States of a certain lot of ground in the city of New Orleans, for the express and only purpose of erecting thereon a branch of the Mint of the United States, together with the necessary appendages, is not a *vente à remere*. It lacks one of the essentials of a sale—a price. Neither is the government of the United States, technically speaking at least, the usufructuary of the property. It has only the use of it—the tenure thereto being precarious, and the right to occupy the same restricted to such time as the government may see fit to occupy it for the purposes of a mint—the Government having the right to remove the same, whenever it may see fit, upon the happening of either of which events, the use of the property would immediately revert to the city.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Hornor & Benedict*, for plaintiff and appellee. *Geo. S. Lacey*, city attorney, for defendant and appellant.

MORGAN, J. The city contracted with the plaintiff to do certain paving on Esplanade street.

A portion of the paving was done in front of what is known as the Mint. For this work plaintiffs seek payment from the city. For answer, the city denies indebtedness, and says that the government of the United States has never legally disclaimed her ownership or title to the property, as is alleged in the petition.

There is no doubt that the contract was entered into as is alleged in the petition ; that the work was done ; that the amount charged therefor is the sum agreed to be paid, and that payment was demanded of the officers of the United States government and refused.

The bill has to be paid by the owner of the property. The question then is, who owns it ?

“ In the month of May, 1835, the City Council of the city of New Orleans, adopted the following resolution :

“ Resolved, That the use of the square of ground, now inclosed, and known as Jackson square, situated in the city of New Orleans, and bounded as follows, to wit : by Esplanade street, Garrison street, Levee street, and the public Road, be ceded to the United States, for the express and only purpose of erecting thereon, a branch of the Mint of the United States, together with the necessary appendages ; and that the Mayor be and he is hereby authorized to convey by notarial act, to Martin Gordon, Esq., the commissioner appointed by authority of the said United States, to superintend the erection and building of the said Mint, the use and occupation of said square, for the purposes aforesaid.

“ Be it further resolved, That should it hereafter be deemed necessary by the government of the United States to remove the Mint contemplated to be established as aforesaid, or to cease to occupy it for such purposes, then the said act to be null and void.

“ On the nineteenth day of June, in the year aforesaid, the United States government, through Martin Gordon, commissioner as aforesaid, accepted the transfer embraced in the foregoing resolution, and from that date, down to the present time, the Federal authorities have been in possession of the property, using the same for the purposes of a Mint.”

The foregoing statement is taken from the brief of the City Attorney.

He urges upon us that this is a *vente à réméré*. We do not think it is. It lacks one of the essentials of a sale, viz : a price.

Neither is the government, technically speaking at least, the usufructuary of the property. It has simply the use of it; the tenure thereto being precarious, and the right to occupy the same restricted to such time as the government of the United States may see fit to occupy it for the purposes of a Mint—the government having the right to remove the same whenever it sees fit, upon the happening of either of which events, the use of the property would immediately revert to the city.

Judgment affirmed.

McStea & Value v. Warren & Crawford.

No. 3127.

MCSTEA & VALUE v. WARREN & CRAWFORD.

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The defendants, successors of Warren, Gilmore & Co., and agents of J. & F. Roberts, who are the drawers of a certain draft, accepted for accommodation by Warren, Gilmore & Co., offered to plaintiffs, indorsees thereof, to pay them within the time agreed upon, a certain stipulated amount for the extinguishment of the draft, which plaintiffs refused to take. No real tender or deposit was made.

The defendants, as the agents of J. & F. Roberts, had a right to tender performance of the contract for said Roberts, and plaintiffs were bound to receive the money in discharge of the contract. The plaintiffs' peremptory refusal dispensed with the actual production of the money or the presence of witnesses as required by art. 407 of the Code of Practice, as no one is required to do a vain thing.

Interest, therefore, could be allowed only from judicial demand.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Elmore & King*, for plaintiffs and appellees. *T. S. McNay* and *John M. Cooney*, for defendants and appellants. *Race, Foster & Merrick*, for succession of Crawford.

LUDELING, C. J. The plaintiffs are indorsees of a draft for \$939 68 drawn on the twentieth of March, 1862, by J. & F. Roberts of Mississippi, on their factors, Warren, Gilmore & Co., who accepted the draft. It was an accommodation acceptance. In May, 1866, the drawer paid \$400 on the draft. On or about the day this partial payment was made, the plaintiffs agreed to take six hundred dollars for the balance of the note, provided that sum were paid on or before the first of January, 1870. The defendants, successors of Warren, Gilmore & Co., and agents of J. & F. Roberts, offered to pay the plaintiffs the amount stated within the time agreed upon—which they refused to take—no real tender or deposit was made.

Warren & Crawford, as agents of J. & F. Roberts, had a right to tender performance of the contract for the Roberts, and McStea & Value were bound to receive the money in discharge of the contract of J. & F. Roberts. 14 La. 214; 3 La. 385.

This offer to discharge the obligation of the Messrs. Roberts, by the payment of \$600, was peremptorily refused by the plaintiffs, and this refusal dispensed with the actual production of the money, in the presence of witnesses, as required by art. 407 of the Code of Practice, as no one is required to do a vain thing. 2 Pars. notes and bills, p. 623.

Interest, therefore, should have been allowed only from judicial demand. C. P. 415.

The evidence shows that the amount agreed to be taken in satisfaction of the note was six hundred dollars; there is an error of fifty dollars therefore in the judgment.

It is therefore ordered and adjudged, that the judgment of the lower court be amended by reducing the amount thereof to six hundred dollars and by allowing interest only from judicial demand.

It is further ordered that the appellees pay costs of appeal.

WYLY, J., *dissenting*. This is a suit on a draft for \$939 68, the defendants being the acceptors thereof. The plaintiffs can only recover \$600, because it is proved that in May, 1866, when they received \$400 on this claim from the drawers, they agreed to accept \$600 more on first of January, 1867, in full discharge of the debt, and in due time the defendants, the acceptors, offered to pay the amount. The main controversy is, as to the time interest should be allowed, the plaintiffs claiming it from first of January, 1867, the defendants contending they should pay it only from judicial demand, to wit: second of July 1870.

This depends upon the question whether when the defendants offered to comply with the contract, they made a real tender of the six hundred dollars actually due to the plaintiffs.

Article 2167 of the Revised Code provides that "when the creditor refuses to receive his payment, the debtor may make him a real tender." * * * And article 2169 says the mode in which a tender must be made is pointed out in the Code of Practice.

Looking to the Code of Practice under the head of real tender, we find article 407, which provides that "when the tender is for money due, it must be made to the creditor himself or at his usual or chosen domicile, by the debtor or by his agent, in the presense of two witnesses residing in the place, by tendering to such creditor the sum which is due to him, with the interest and such costs as he may have incurred, and exhibiting such sum to him in the presence of such witnesses, in the current money of the United States." And by article 415 it is provided that when such tender is proved at the trial, the plaintiff must pay the costs and can only recover the sum tendered, without interest.

In order to deprive the plaintiff of the interest under article 415, C. P., it devolved upon the defendants to comply strictly with the requirements of article 407, in regard to the mode of making a real tender.

The defendants, who made no tender conformably to article 407, C. P., can not be heard to claim of the plaintiffs the penalty prescribed by article 415 for refusing to accept the real tender.

It is not pretended that the defendants tendered to the plaintiffs the sum due to them and exhibited currency of the United States for the amount thereof in the presence of two witnesses.

They simply offered their check for the amount. The defendants, however, contend that as the plaintiffs said they would not accept payment of the debt from them, a tender was not necessary, and therefore, the penalty prescribed by article 415 must be imposed. I do not so understand the law. Article 415 requires proof that "the defendant has made a real tender, in the form above prescribed of the sum due,"

McStea & Value v. Warren & Crawford.

* * * and if such is proved, the plaintiff can only recover the amount tendered without interest. This article is penal in its character and the party seeking its benefit must comply strictly with the requirements of article 407. The articles referred to modify the general doctrine on the subject of tender, and therefore the authorities cited from the commercial law are not applicable.

In *Bacon et al. vs. Smith et al.*, 2 An. 442, it was held that the mere announcement of the maker of a note of his readiness to pay, is not a legal tender and can not stop interest. In *Mudd vs. Stille's heirs*, 6 La. 17, it is held that a real tender can not be made so as to stop interest, unless the legal formalities are strictly pursued. In the case at bar the formalities required by article 407 C. P., were not complied with—there was no real tender, and the penalty announced in article 415 C. P., ought not to be imposed. I therefore feel constrained to dissent in this case.

No. 3332.

JOHN P. STAGG v. F. BELDEN.

The managers of defendant's business, during his absence, had employed the plaintiff as clerk in his store, at the rate of two thousand dollars per annum, to begin on the first day of March, 1870, with a proviso that, if his services were not found satisfactory by defendant, the engagement would be canceled on the first day of April, on paying to plaintiff one hundred and fifty dollars for his services in March. This contract was to be ratified by defendant, then absent. He returned on the thirteenth of April, and on the twenty-fifth of the same month, he discharged the plaintiff, whose claim under the contract is the object of the present suit.

If the managers of defendant's business had no authority to employ plaintiff, their act should have been repudiated immediately. It was unfortunate for defendant, if his agents failed to give him correct information of the contract, but it was not plaintiff's fault. Besides, when defendant returned to his store on the thirteenth of April, and found the plaintiff employed as clerk, it was his duty to inquire concerning the terms upon which his agents had engaged his services. Nothing of the kind, however, was done by him, until he concluded to discharge plaintiff on the twenty-fifth of April. His silence from early in March till the twenty-fifth of April, must be regarded as a tacit acceptance of the employment of plaintiff.

A PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Hays & New, James Ligan*, for plaintiff and appellee. *G. A. Breaux*, curator *ad hoc*, for defendant and appellant.

WYLY, J. The defendant discharged the plaintiff from his employment as clerk on the twenty-fifth April, 1870, and was sued by the latter for the year's salary.

It appears that the defendant is absent the greater part of the time from the State and that his store is managed by his clerk Eames, and his son W. C. Belden, the bookkeeper. In February, 1870, Eames applied to plaintiff to employ him as clerk in the store of the defendant, proposing to hire him by the month at \$150 per month; the proposition was declined, the plaintiff desiring to be employed by the year at

Stagg v. Belden.

a salary of two thousand dollars. Eames then proposed to take the plaintiff on probation for sixty days. This was declined. It was finally agreed that the plaintiff should be employed on probation of thirty days at the salary demanded by him, services to begin on the first day of March. Before entering upon the services the plaintiff required the following written contract to be signed :

“NEW ORLEANS, March 1, 1870.

“F. Belden, New Orleans :

“DEAR SIR—Your proposition, made to me by your son, Mr. W. C. Belden, to the effect that, from the first day of April, 1870, you would pay me, as a salesman and solicitor of trade for your business, the sum of two thousand dollars per annum, with a bonus of twelve hundred dollars, provided my individual sales amounted to sixty thousand dollars in twelve months, is hereby accepted.

“If, on the first day of April, you are not satisfied with the manner in which my services are rendered, this engagement will be annulled on your paying me one hundred and fifty dollars for services in March, 1870.

“Yours respectfully,

(Signed)

“JOHN P. STAGG.”

Across the face of this document is written :

“This is accepted, subject to the approval of F. Belden.

(Signed)

“W. C. BELDEN.”

This occurred during the absence of the defendant. He returned, however, on the thirteenth of April, 1870, and on the twenty-fifth of the same month he discharged the plaintiff. The defense is that, neither Eames nor W. C. Belden had authority to employ the plaintiff, and as soon as the defendant was informed that the plaintiff was employed under the written contract by the year, he repudiated the contract and discharged the plaintiff. If Eames and W. C. Belden had no authority to employ the plaintiff their act should have been repudiated immediately. This was not done. The defendant, however, contends that it was the duty of the plaintiff to have communicated to him the contract, and, if it was not repudiated earlier, it was the fault of the latter. The contract was known to Eames and W. C. Belden who were the managers of defendant's store and his agents. It was their duty to advise him that they had employed the plaintiff. And the proof is that, soon after the contract was made, the defendant was so advised by Eames ; but, in that correspondence, Eames stated that the plaintiff was employed at \$150 per month and was liable to be discharged at any time at the option of the defendant. That the defendant's agent failed to give him correct information in regard to the contract with plaintiff was unfortunate ; it was not, however, the fault of the plaintiff.

Stagg v. Belden.

But when the defendant returned to his store on the thirteenth of April, 1870, and found the plaintiff employed as a clerk, it was his duty to inquire the terms upon which he was employed. Nothing was said, however, upon the subject, until finding business growing dull and there being too many clerks, he concluded to discharge the plaintiff on the twenty-fifth of April, twelve days after his return. The defendant contends that as the contract was accepted subject to his approval, he is not bound thereby. His silence from early in March till twenty-fifth April, must be regarded as a tacit acceptance of the employment of the plaintiff, because the proof is, he acquiesced during this period, although advised early in March of said employment.

There is no doubt that the plaintiff accepted the situation subject to the approval of F. Belden, under the belief that his agents Eames and W. C. Belden would communicate to their principal the terms of the contract and that he would either ratify or reject it within the thirty days fixed as the period of probation. Any other construction of the contract would allow the defendant, through his agents, to perpetrate a fraud on the plaintiff; it would allow him to get the services of the plaintiff at a period when they were doubtless really needed, on terms more favorable to him than those consented to by the plaintiff. If the view taken by the defendant be correct, he has been greatly benefited by the course pursued by Eames his agent, in giving incorrect information in regard to the contract by which the plaintiff was employed. By thus withholding from their principal the exact terms of the contract, Eames and W. C. Belden have succeeded in gaining for him the services of the plaintiff on a probation of nearly sixty days, notwithstanding his positive refusal to serve on a longer probation than thirty days.

If defendant's theory be good he could have held the plaintiff as well, if his interest demanded it, on a probation of six or nine months. He could have stood by and gained the advantages of the plaintiff's labor as long as his interest required it, knowing that his agents would withhold from him the terms of the contract so that he would not be compelled to ratify or reject it.

We think both the equity and the law of the case is with the plaintiff and the conclusion of the court below was correct.

Judgment affirmed.

MORGAN, J., *dissenting*. In this case the contract, which was in writing, was made by the party holding defendant's power of attorney, and was subject to his (the defendant's) ratification. This ratification was never given. I therefore, think that the plaintiff has no case, and I dissent from the opinion of the majority.

Rehearing refused.

No 3409.

SIMON NETTER, Under Tutor, v. S. HERMAN and L. LEVY.

This suit is instituted by the under tutor of the minors Kohn, to recover from S. Herman and L. Levy, the amount coming to them as heirs of their father in the property belonging to the partnership which had existed between their father and said Herman and Levy.

It is apparent from the record that the minors' interest in the succession of their father had not been handed over to their tutrix at the time she entered into another partnership with the surviving partners of her deceased husband. It was this interest, added to her rights as widow in community, which formed her share of the partnership stock. The contract was, in fact, a contract of partnership between herself, her minor children and the surviving partners of her husband. The law does not authorize such a partnership. It was an investment of her minor children's funds in an enterprise for which she had no warrant. Up to this point, therefore, the minors' property must be considered to have remained in the hands of the surviving partners.

But this court does not see where the under tutor finds any authority for attacking the defendants. If any cause of action exists against the defendants, the tutrix of the minors is the proper person to assert it.

The under tutor acts for the minor whenever the interest of the minor is in opposition to the interest of the tutor. Perhaps, in case of collusion between the debtor of a minor and his tutor, the under tutor might be authorized to interfere. But in this case no collusion is asserted. The rights of the minors have not been invaded by the defendants. Whatever transactions they may have had in which the minors' interests were involved, they had them with their tutrix, who was the only person having authority with whom they could contract. If they acted fraudulently toward the tutrix, fraud vitiates any contract, and the tutrix has her action to set it aside. If the tutrix has acted in bad faith towards her wards, the under tutor has his action against her.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Breaux & Fenner*, for plaintiff and appellant. *Cooley & Phillips*, for defendants and appellees.

MORGAN, J. Leopold Kohn was a member of the firm of Kohn, Herman & Co. The firm was composed of Leopold Kohn, S. Herman, and Leopold Levy. By the terms of their contract, the partnership was to cease on the death of either of the partners. In this event the survivors had the right to continue the partnership and to keep the partnership property at an estimation to be fixed upon an inventory to be taken immediately after the decease of the partner, the inventory to be taken between the surviving partners and the widow and heirs of the deceased partner, the survivors to furnish security *in solido* to the satisfaction of the surviving widow and heirs, for the amount coming to the deceased partner.

Kohn died on the second of September, 1866. His widow was confirmed as natural tutrix on the twenty-fourth of the same month. On the eighteenth of December, 1866, she applied to be appointed administratrix of her husband's succession, and prayed that an inventory be taken.

On the eleventh of January, 1867, the inventory ordered to be taken was filed. The interest of the deceased in the partnership was estimated at \$21,242 29. On the twelfth, she was confirmed as adminis-

tratrix. Thus the inventory was filed before she had qualified as administratrix.

On the seventh of January 1867, before she had been appointed executrix, and without any authorization on the part of the court, she went before a notary public in company with Herman and Levy and they each declared, that they had made a partition of the property belonging to the partnership of Kohn, Herman & Levy, and gave to each other an acquittance therefor. In this act the widow assumed to act as well in her capacity of tutrix as well as in her own name. By the same act the widow and the surviving partners of her husband formed another partnership to last twelve months. In this partnership the widow invested \$21,934 16, a few hundred dollars over and above the amount of the appraised value of her deceased husband's interest in the property belonging to the partnership which had existed between her husband and Herman and Levy.

Subsequently, in the early days of December, 1867, she married Sylvian Levy.

Before her marriage she was retained in the tutorship of her minor children, by and with the advice and consent of a family meeting.

On the sixteenth of December, 1867, the partnership which had been entered into between Mrs. Kohn (now Mrs. Levy), S. Herman and Leopold Levy, was dissolved, Mrs. Kohn selling out her interest therein to Herman and Leopold Levy for \$19,413 22. She was authorized to dissolve the partnership and to make the sale by her husband Sylvain Levy.

Subsequent to this sale, Sylvian Levy and his wife appear to have removed to Texas.

This suit is instituted by the under tutor of the minors Kohn to recover from Simon Herman and Leopold Levy, the amount coming to them as heirs of their father in the property belonging to the partnership which had existed between their father and Herman and Levy. The amount claimed is \$11,746 39.

The district judge decided against the under tutor. He has appealed.

It is apparent that the minors' interest in the succession of their father had not been handed over to their tutrix at the time she entered into the partnership with his surviving partners. It was this interest, added to her rights as widow in community, which formed her share of the partnership stock. The contract was, in fact, a contract of partnership between herself, her minor children and the surviving partners of her husband. The law does not authorize such a partnership. It was an investment of her minor children's funds in an enterprise for which she had no warrant. Up to this point, therefore, the minors

 Netter v. Herman and Levy.

property must be considered to have remained in the hands of the surviving partners.

But we do not see where the under tutor finds any authority for attacking the defendants. The minors are represented by their tutrix. If any cause of action exist against the defendants, their tutrix is the proper person to assert it. The under tutor acts for the minor whenever the interest of the minor is in opposition to the interest of the tutor. C. C. 273. Perhaps in case of collusion between the debtors of a minor and his tutor, the under tutor might be authorized to interfere. But, in this case, no collusion is asserted. The rights of the minors have not been invaded by the defendants. Whatever transactions they may have had in which their interests were involved, they had them with their tutrix, who was the only person having authority with whom they could contract. If they acted fraudulently toward the tutrix, fraud vitiates all contracts, and the tutrix has her action to set it aside. If the tutrix has acted in bad faith towards her wards, the under tutor has his action against her.

Judgment affirmed.

 No. 5164.

STATE OF LOUISIANA v. E. B. TINNEY.

The offense for which the accused was tried is not prescribed, because the indictment was not filed within a year after the crime had been committed. The statute merely says that the indictment must be found within a year after the offense was made known to the public officer having power to direct investigation and prosecution.

The law does not say that, because the foreman of a grand jury can not write his name, the indictment found by the grand jury of which he is foreman shall not be good.

After a motion for a new trial which has been refused, it is too late to urge in arrest of judgment that the jury were guilty of misconduct, partiality and prejudice against the accused.

The judge *a quo* did not err in refusing to permit the introduction in evidence of the certificate of the *post mortem* examination given by the physician who made it. There is nothing to show that the physician himself could not have been procured. His testimony, if it could be obtained, was the evidence required, and not his certificate.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J.* Criminal case. *James D. Augustin* and *Julien Michel*, for appellant. *Henry C. Dibble*, Assistant Attorney General, for appellee.

MORGAN, J. The defendant, convicted of manslaughter, has appealed from the judgment of the district court which sentenced him to seven years' imprisonment at hard labor in the penitentiary.

His first complaint is, that the crime charged against him was on the face of the papers prescribed, when what purports to be the indictment, was filed in court. He relies on section 986 of the Revised

Statutes, which declares that "no person shall be prosecuted, tried or punished for any offense, willful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentment for the same be found or exhibited within one year next after the offense shall have been made known to a public officer having the power to direct the investigation or prosecution." The slaying is alleged to have taken place on the third September, 1871. The indictment, or what the defendant says purports to be the indictment, was found on the second of October, 1871. The objection, however, seems to be that it was not filed until the second October, 1872. The statute does not sustain the objection. The indictment was found within a year next after the offense was made known to the public officer having the power to direct investigation and prosecution, and this is what the law says shall be done—not that the indictment shall be filed within a year after the crime has been committed.

The second objection is that the "paper purporting to be an indictment against him lacks all the essential requisites of an indictment." The fault complained of is that it is not signed and indorsed by the foreman of the grand jury, and as the constitution requires. The indictment is signed thus:

"A true bill.

his
WILLIAM X TAYLOR,
mark
Foreman."

The law does not say that because the foreman of a grand jury can not write his name, the indictment found by the grand jury of which he is foreman shall not be good.

His third objection is that "the statutes of the State restricting the qualifications of jurors to citizens of the State who are duly qualified electors, registered voters, are unconstitutional and violative of articles five (amendments) and six of the constitution of the United States, and of the article xiv, section one, constitutional amendments thereto, and of article six of the constitution of the State. By them the accused has a constitutional right to be tried by a jury of his peers, drawn from among all of his peers who enjoy the civil and political right of citizens and freemen, and who have the right and capacity to enjoy them, whether said political rights are exercised actively by registry on a list of duly qualified electors and evidenced by a certificate of registry or not."

We quote the language of the objection. It answers itself.

The next ground he stands upon is that several of the jury were guilty of misconduct and partiality and prejudice against him, and he proved by one Bron that he, Bron, was a juror in another case; that several of the jurors who were impaneled on the trial of the defend-

State of Louisiana v. Tinney.

ant were also jurors in the case upon which Bron was a juror, and that during the conversations and discussions in the case alluded to, several of the jurors who tried the defendant declared that in his (the defendant's) case, "he ought to be convicted, as he was a bad man anyhow," and they would convict him if taken as jurors in his case. This was urged in arrest of judgment after a motion for a new trial had been refused. The judge did not err in refusing to consider it. It came too late. The exception to the ruling of the judge in refusing to permit the certificate of the *post mortem* examination given by the physician who made it, is not well taken. The judge did not err. There is nothing to show that the physician himself could not have been procured, and his testimony, if it could be obtained, was the evidence required, and not his certificate.

Judgment affirmed.

Rehearing refused.

No. 3324.

CHARLES MORGAN v. G. LOMBARD.

The mere fact that for thirty or forty years the public was permitted to pass over a certain piece of land, would not of itself constitute the place a *locus publicus*. The property which is the object of this litigation has never been dedicated to the public, nor has any expropriation taken place. Therefore it remains private property.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Leovy, Monroe & Hart*, for plaintiff and appellee. *E. Bermudez* and *J. Meunier*, for defendant and appellant.

LUDELING, C. J. The plaintiff, alleging that the passage or alley running from the Bayou road to Columbus street is a public thing, enjoined the defendant from fencing it or obstructing the use of it by the public. The defendant claims that the property belongs to him. There was judgment in favor of the plaintiff against the defendant, decreeing the alley to be a *locus publicus* and for \$500 damages. The defendant has appealed.

There is no evidence in this record of an intention on the part of the owners of said land to dedicate it to public use. The mere fact that for thirty or forty years the public was permitted to pass over this ground, would not of itself constitute the place a *locus publicus*. But we think there is evidence to negative the idea of an intention on the part of the owners to dedicate the property to the public. 3 An. 282; 16 An. 404; 15 An. 316; 10 An. 81; C. C. 762, et seq.

In 1800, Antonio Ramis sold to Pablo Cheval one arpent and one hundred and forty-one feet on Bayou road by three arpents deep. On

Morgan v. Lombard.

the twentieth March³, 1822, Cheval caused a plan of this land to be made, and he sold the same to Chevalier Coulon de Villiers. On this plan figures the strip of land in question, and it is marked, "Chemin appartenant aux héritiers Castanedo."

In 1823, Chevalier C. de Villiers sold this property to Tala. It is described as being on the Bayou St. John road, measuring one hundred feet fronting the bayou, and running back three arpents deep "attendant du côté du bayou, et par derrière, aux terres des héritiers de feu Joseph Castanedo."

There is parol evidence to show that this was a private road, originally used by the proprietor to haul wood, and that at different periods he had temporarily closed it. It also appears that it was always considered by the family of Castanedo and his neighbors that the road was private property, and it was inventoried as such when Castanedo died.

This property has never been dedicated to the public, nor has it been expropriated; therefore it remains private property.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment dissolving the injunction. It is further adjudged that the defendant is the owner of the property in question, and that he have judgment against the plaintiff for the sum of \$250 as damages, and for costs in both courts.

Rehearing refused.

No. 4815.

JOSEPH RAU, Curator of HENRIETTA HOOKER, v. MOSES KATZ et als.

It is evident that judgment in damages against the civil sheriff for effecting the sale complained of, is erroneous, as he was acting only under the direction of a court of competent jurisdiction and carrying out its orders.

The sheriff seems to have been informed that a suit in interdiction had been instituted against the owner of the property seized, but that was no warrant for him to stop the sale. It did not follow that interdiction would result from the suit. If the parties in interest had desired to stop the sale, they should have enjoined it.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. J. Fisk*, for plaintiff and appellee. *R. J. Ker, Garrett & Walker, Hays & New*, for defendants and appellants.

MORGAN, J. Henrietta Hooker purchased a certain piece of property in the square bounded by Baronne, Dryades, Seventh and Eighth streets, containing two tenements and outbuildings. The purchase was made on the seventeenth May, 1858. On the tenth October, 1870, she sold, by public act, a portion of this property to Jean Barrere for nine hundred dollars.

On the thirtieth May, 1872, she executed a mortgage on the remaining portion of the property, on which the house is situated, which she occupied as her residence, in favor of Moses Katz for eight hundred and fifty dollars, payable six months from the said thirtieth May, 1872. On the fourth December, 1871, Katz applied to and obtained from the Sixth District Court of this city an order of seizure and sale directed against the property subject to his mortgage. The property was advertised for sale by the sheriff. On the sixteenth January, 1873, Henrietta Hooker alleged that the mortgage under which the executory process issued had been obtained by fraud and without consideration; that she is old, feeble and illiterate, not knowing how to read or write; that being in need she consented that Katz should sell for her the house and lot forming the corner of Seventh and Dryades streets, for \$900 in money, a shawl valued at \$8, and some domestic valued at \$1 50; that after paying her indebtedness a balance remained due to her of \$675; that when she was called upon to make her mark to the act, which she is now informed is a mortgage, she supposed it was to enable her to draw the proceeds of the property which she had sold. She prayed for an injunction restraining the sale of her property, and asked for judgment against Katz for \$675. The injunction issued. A rule was taken to set it aside, and on the thirty-first January, 1873, it was set aside. From this judgment no appeal was taken.

On the tenth February, 1873, the counsel who had represented Henrietta Hooker in the foregoing proceedings, instituted suit in the Second District Court, in the name of Emily Mills, to cause her to be interdicted. She alleged that she was her niece; that she had had the principal care and control over her for four years, and that she is old, infirm, insane and utterly incompetent to manage her own business. Service of this petition having been made upon her, and no answer thereto having been filed, an attorney was appointed to defend her. He filed a general denial. After hearing testimony the judge ordered her interdiction, and, upon the recommendation of a family meeting, Joseph Rau was appointed her curator on March 28, 1873.

In the meanwhile, on the twenty-second March, 1873, the property mortgaged to Katz was sold under execution upon the executory process issued by the Sixth District Court, and Jean Barrere became the purchaser thereof.

This suit is instituted by the curator of Henrietta Hooker against Barrere, Katz and W. P. Harper, sheriff, to annul the sale made by her to Barrere on the tenth October, 1870, and the sale made by the sheriff on the twenty-third March, 1873, in the suit of Katz v. Hooker, at which sale, as we have seen, Barrere became the purchaser, and for damages against them all, which she fixed at \$10,000, for having been

forcibly ejected from the last described property. The allegations are that Henrietta Hooker was notoriously insane, and entirely incompetent to transact business when the first sale to Barrere was consummated, and that she had been interdicted, and a copy of the judgment of interdiction had been served upon Katz, before the sale by the sheriff was made; that she received none of the money which was the price of the first sale, and that she was not indebted to Katz in any sum when she executed the mortgage which resulted in the sale of the second piece of property by the sheriff, and that all this was done by Katz and Barrere with the intention of defrauding the insane and interdicted person. He prays also that Barrere be enjoined from interfering with her in the possession of the house. Barrere excepted to this proceeding:

First—That plaintiff shows no cause of action.

Second—That the matters set up for an injunction should have been set up in his proceedings before the Sixth District Court, on the trial of his original injunction before that court.

Third—Because the Superior District Court is without jurisdiction to determine upon the validity of judicial proceedings determined upon by another court, and that his remedy is by an action of nullity, to be brought in the court that rendered the judgment which is sought to be annulled.

In so far as relates to the annulling of the sheriff's sale, all the defendants excepted to the jurisdiction of the Superior District Court, *ratione materiae*, on the ground that it could not annul the sale which was the result of a judgment of the Sixth District Court. Subsequently Jean Barrere answered the petition, in so far as it seeks to annul the sale made to him in October, 1870, filing a general denial thereto.

All the exceptions were overruled on the fifth May, and on the sixteenth of May default was entered against Katz and Harper. No default was taken against Barrere.

Upon these pleadings judgment was rendered in favor of the plaintiff and against all the defendants, perpetuating the injunction, and condemning them to pay \$200 damages; annulling the sale made by Harper, sheriff, on the twenty-second March, 1873, and annulling the act of mortgage executed by Henrietta Hooker, in favor of Moses Katz, on the thirtieth May, 1872.

After an ineffectual application for a new trial the defendants have appealed.

The conclusion to which we have come on the merits, renders it unnecessary that we should express any opinion with regard to the exceptions. As regards the sheriff, Harper, it is evident that the judgment

against him is erroneous, as he was acting only under the direction of a court of competent jurisdiction and carrying out its decrees. The allegations in the petition that he acted in defiance of the judgment of interdiction, which had been pronounced against Henrietta Hooker, are not sustained. Nor do we see how this could have been possible, as the judgment of interdiction was not pronounced until two days after the sale was made. The sheriff seems to have been informed that suit was instituted to have her interdicted, but this was no warrant for him to stay the sale. It did not follow that interdiction would result from the suit. If the parties in interest had desired to stop the sale they should have enjoined it.

With reference to Barrere there is no evidence in the record to show any complicity between himself and Katz, or that he was party to any scheme which had been concocted for the purpose of defrauding her. In both instances he purchased the property which was offered for sale. In the first case he paid the money to the notary, who gave it to the vendor; and in the second case he purchased at public sale, and paid the price to the sheriff. He is not shown to have had any intimate knowledge of his vendor, and it is not shown that her insanity was notorious at the time the sales were made. Neither do we think the evidence shows that Katz has taken advantage of her situation, or that she was insane.

Neither do we think the evidence shows that Katz has taken advantage of her condition, or that she was insane (if she be so now), at the time the sale and mortgage were executed. She is very old and infirm, and her relatives swear that she is unable to take care of herself, and so does the physician who examined her. But in the executory proceedings she appeared, through her counsel, who now appears for her curator, and acted in her own behalf, and, when examined on the stand, told her story quite as intelligently as did the other witnesses, and failed to satisfy the judge of that court that fraud had been practiced upon her. As to her claim under the homestead law, we can not pass upon it in this proceeding.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

Rehearing refused.

Billgery v. Schnell and Joachim.

No. 5119.

JOSEPH BILLGERY v. JACOB SCHNELL and MARTIN JOACHIM.

Admitting that a debtor should have intended to defraud his creditors by the sale of his property, yet it is essential that the purchaser should be a party to the fraud in order that the sale be set aside. The declaration of the notary that the cash payment had been made in his presence, which declaration is not contradicted by any positive testimony, would outweigh the assertions of witnesses as to the purchaser's want of funds. It is a difficult matter for one man to tell what amount of money is or is not in his neighbor's pocket.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Hornor & Benedict*, for plaintiff and appellee. *Braughn & Buck*, for Joachim, defendant and appellant.

MORGAN, J. Plaintiff sold to the defendant merchandise amounting to about \$700, in full payment of which he took his two promissory notes for \$305 each, dated first April, 1873, and payable sixty and ninety days after date. He also indorsed two notes of the defendant's, one for \$500, dated October 1, 1872, and payable one year after date, and the other for \$600, dated October 9, 1872, and payable one year after date.

The first note for \$305 not having been paid at maturity, the plaintiff instituted this suit, in which he asks for judgment against the defendant for \$1805, and upon his averment, supported by affidavit, that by public act on the thirtieth May, 1873, the defendant sold his property and stock in trade to Martin Joachim for a nominal consideration, with the intent of defrauding him, petitioner, all of which was done to conceal his property from his creditors, and to defraud them of their just claims, he obtained an attachment and seized the property sold to Joachim. Subsequently he filed a supplemental petition, in which, reiterating the allegations of the original petition, he avers that the sale made by defendant to Joachim is fraudulent and simulated, and therefore null and void. He prays for citation against Joachim and a decree annulling the sale.

The district judge annulled the sale and decreed the property to belong to Schnell, and rendered judgment against him for \$1805, with privilege on the property attached. Joachim alone has appealed.

The sale from Schnell to Joachim was made by public act on the thirtieth May, 1873, the terms being \$3500, in part payment whereof he presently paid in ready money \$2000, and for the balance gave his promissory notes at six, twelve and eighteen months. Immediately after the sale he took possession of the property, and remained in possession thereof until it was taken by the sheriff in obedience to the writ of attachment which issued on the fourth June following.

The evidence does not satisfy us, as it did the district judge, that the sale was a fraudulent or a simulated one in so far as Joachim is con-

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cerned. Schnell may have intended to defraud his creditors, but we do not see that Joachim was a party to the fraud, and this would be essential in order that the sale should be set aside. Neither do we find that the sale was a mere simulation. Some witnesses swear that Joachim had no means, it is true. But it is a difficult matter for one man to tell what amount of money is or is not in his neighbor's pocket. The declaration of the notary that the cash payment had been presently made, which declaration is not contradicted by any positive testimony, would outweigh the assertions of witnesses as to his impetuosity, and the fact, established by the plaintiff, that immediately after the sale he went to California and embarked in business there, he having already established that he was in embarrassed circumstances, would corroborate the defendant's assertions and the notary's declaration that the sale was a serious one.

It is therefore ordered, adjudged and decreed that the judgment of the district court, in so far as it relates to the defendant, Joachim, be avoided, annulled and reversed; and it is now ordered that there be judgment in favor of said defendant, Joachim, with costs in both courts.

Rehearing refused.

No. 4906.

JOHN F. DALY v. E. E. DUFFY and SCHOENHAUSEN.

There is no law which prohibits a member of the bar from becoming a surety on a sequestration bond. If there be any rule of court to the contrary, it is not known on what authority it rests.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. W. H. Hunt, W. O. Denegre*, for plaintiff and appellant. *W. W. King, Braughn & Buck*, for defendants and appellees.

MORGAN, J. This suit commenced by a writ of sequestration issued upon the following affidavit:

"Personally appeared before me the undersigned authority, John F. Daly, who being duly sworn, deposes and says, that he is the true and lawful owner of the sum of forty-five hundred dollars, in paper currency of the United States of America, now on deposit in the Teutonia National Bank of New Orleans, to the order of one E. E. Duffy and one Schoenhausen, whose christian name is to this deponent unknown; that the aforesaid sum of forty-five hundred dollars was collected by the said Teutonia National Bank of New Orleans as the proceeds of a sight draft purporting to have been drawn by your deponent on May, 15, 1873, at New Orleans, La., on Messrs. Simms, Harrison & Co., of Mobile, Ala. Deponent further specially denies ever having drawn

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any such draft in favor of said E. E. Duffy or said Schoenhausen (whose christian name is to this deponent unknown), or deponent avers that if any such draft ever was by him drawn, it was totally without consideration, and while he was drugged and bereft of his reason by the machinations of said E. E. Duffy and the said Schoenhausen.

"Deponent further avers that he fears that the said E. E. Duffy and the said Schoenhausen (whose christian name is to this deponent unknown) will withdraw the said sum of forty-five hundred dollars from the said Teutonia National Bank of New Orleans, and will part with, conceal or dispose of the same during the pendency of this suit, and that a writ of sequestration is necessary to protect the rights of deponent herein.

"Wherefore he prays that the accompanying interrogatories be served upon Charles Potthoff, the President of the Teutonia National Bank of New Orleans, and that he be ordered to answer the same within the legal delays.

"(Signed)

JOHN F. DALY.

"Sworn to and subscribed before me this nineteenth day of May, A. D. 1873.

"(Signed)

PAUL T. ABADIE, Deputy Clerk."

On the following day he presented a petition to the judge in which the allegations of the affidavit are reiterated, and in which he prayed that a writ of sequestration issue, that the sheriff take into his possession the money levied by him, and that after a hearing, he be decreed to be the owner thereof.

On the same day the defendants took a rule on the plaintiff to show cause why the sequestration should not be set aside on the grounds:

"*First*—Because the affidavit made by plaintiff is false and untrue in every particular.

"*Second*—Because the sequestration bond is informal, null and void.

"*Third*—Because the surety upon the sequestration bond is not good and solvent and not possessed of the legal qualifications.

"*Fourth*—Because the surety upon the sequestration bond (Thos. S. McCay, Esq.,) is an attorney-at-law, and as such, prohibited by the Rules adopted for the government of the district courts, from being on a bond or security in any cause."

Daly died, and Parker, Public Administrator, made a party to the suit, prosecutes an appeal from a judgment dismissing the sequestration.

First—It is not shown that the affidavit is false.

Second—The bond is in the usual form.

Third—The surety on the bond swears that he is worth the sum therein stipulated for, his property consisting partly in real estate. It is contended that his estimate of the value of this property is exaggerated, but we are not satisfied that such is the case.

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Fourth—We know of no law which prohibits a member of the bar from becoming a surety on a sequestration bond. If there be any rule of court to the contrary, we do not know upon what authority it rests.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that the rule herein taken on the twentieth of May, 1873, to set aside the sequestration herein, be dismissed; defendants to pay the costs in both courts. Rehearing refused.

No. 4948.

CITY OF NEW ORLEANS v. S. W. RAWLINS.

In this suit for the taxes of 1873, the defendant insists that the default, the introduction of proof and the judgment are irregular and void, because not taken in this particular suit, but in a general entry of, "City of New Orleans v. Samuel Boyd & Co., and sundry and other taxpayers, from No. 50,000 to 59,864 inclusive;" and that the judgment signed is not the judgment entered on the minutes.

The judgment appealed from, which has the signature of the judge, is the one which the defendant has an interest in complaining of. The next question is as to his having been legally cited.

By the act, No. 48 of 1871, § 9, a publication of the names of the delinquent taxpayers, with the amounts due by them respectively, in the official journal, is a legal citation to each. After a certain delay, "upon the production and filing of said claims or bills in the appropriate and competent court, and the production of proof of publication, judgment shall be immediately rendered in favor of said city and against the delinquent taxpayer or debtor." According to this provision of the law the taking of a default was unnecessary, and, if taken, the defendant has no right to complain of a formality which is in his favor.

There is no sacramental form for entering judgments on the minutes of the court. The records of the court must show, however, the proceedings; and, in these tax suits, an entry showing that judgment was rendered in suits from one number to another inclusive, is a record of the fact that a judgment was allowed in each for the amount of the claim.

The record here shows that a judgment was entered and signed in the case of the city of New Orleans v. Rawlins, No. 57,679, which is a number included in those in which a judgment was entered on the minutes of the court. The law assimilates the proceedings in this class of cases to those in executory proceedings, except that the proof must be presented in court.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George S. Lacey*, City Attorney, for plaintiff and appellee. *R. H. Marr*, for defendant and appellant.

HOWELL, J. This is a suit for the taxes of 1873, and the defendant has appealed from a judgment confirming a default against him. The objections he urges before us are technical and relate to the form of proceeding in the lower court.

He insists that the default, the introduction of proof and the judgment are irregular and void, because not taken in this particular suit, but in a general entry of "City of New Orleans vs. Samuel Boyd & Co. and sundry other taxpayers, from No. 50,000 to 59,864, inclusive," and that the judgment signed is not the judgment entered on the minutes.

The judgment appealed from, which has the signature of the judge, is the one which the defendant has an interest in complaining of, and the important questions are, was he legally cited, and does the evidence sustain the judgment?

By the law on this subject a publication of the names of the delinquent taxpayers, with the amounts due by them respectively, in the official journal, is a legal citation to each. After a certain delay, "upon the production and filing of said claims or bills, in the appropriate and competent court, and the production of proof of publication, judgment shall be immediately rendered in favor of said city and against the delinquent taxpayer or debtor." Act No. 48 of 1871, § 9. According to this the taking of a default was unnecessary, and defendant has no cause to complain of this formality, which is in his favor. When the bill against him, in the prescribed form, was filed and proof of publication adduced, the judge had only to render the judgment. There is no sacramental form for entering judgments in the minutes of the court. The records of the court must show, however, the proceedings in such court, and in these tax suits an entry, showing that judgment was rendered in suits from one number to another inclusive, is a record of the fact that a judgment was allowed in each for the amount of the claim in each. When the judgment is drawn up for signature and becomes final by the signature of the judge, it must conform to the proof, or it will be erroneous and may be corrected. The record here shows that a judgment was rendered and signed in the case of city of New Orleans v. S. W. Rawlins, No. 57,679, which is a number included in those in which a judgment was entered on the minutes of the court.

We think the law assimilated the proceedings in this class of cases to those in executory proceedings, except that the proof must be presented in court, the law saying expressly that "the only process necessary for judgment upon said claims or bills for taxes shall be said publication," and upon the simple filing of the said bills and proof of said publication, it is the duty of the judge to render a judgment.

It appears that some parties, embraced within the numbers specified, did have an opportunity to file defenses, and nothing shows that this defendant could not have done the same.

The other questions are disposed of in the case of Burthe & Klein, just decided. A year's interest is erroneously allowed in the judgment.

It is therefore ordered that the judgment appealed from be amended by allowing interest thereon from July 31, 1873, instead of July 31, 1872, and that as thus amended it be affirmed, costs of appeal to be paid by appellee.

No. 5166.

L. H. GARDNER & Co. v. J. J. McDANIEL & Co.

From all the evidence on record in this case it results that the defendants, when they drew the draft sued upon, had a just right to believe that it would be duly honored. Therefore, they were entitled to due protest and notice of the dishonor of the bill. With regard to the promise of payment alleged to have been made by the defendants, it was coupled with conditions which were not accepted, and for that reason it can not entitle the plaintiffs to recover.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. T. M. Gill*, for plaintiffs and appellants. *E. D. White, Samuel Jamison, Jr.*, for defendants and appellees.

TALIAFERRO, J. This suit is brought upon a bill drawn by defendants, merchants residing in Texas, upon Gregg & Ford, of Shreveport, La., in favor of the plaintiffs for \$840 30. The bill is dated January, 13, 1873, and made payable ten days after date. Not being paid, it was protested on the twentieth of March following.

The suit was brought by attachment of a lot of merchandise in New Orleans. The answer is a general denial. The case was first decided in favor of plaintiffs; but upon affidavit made of new evidence discovered, a new trial was granted, the result of which was the rendition of a judgment against the plaintiffs of nonsuit. On the part of the plaintiffs an appeal is taken. The defense rests upon want of due protest and notice. It appears that for several years previous to the date of this draft, there had been an established course of business between J. J. McDaniel & Co., of Mount Carmel, in Texas, and Gregg & Ford, of Shreveport, Louisiana. The Texas merchants had been in the habit of shipping to their friends Gregg & Ford, cotton and other commodities of trade, and the latter had accepted and paid drafts drawn upon them by the defendants.

The prominent inquiry in the case is: Had J. J. McDaniel & Co., when they drew this draft, good reason to believe that Gregg & Ford would pay it? There is a large amount of evidence bearing mainly on this point. There is a portion of it contradictory. It is, however, fully shown that between the defendants and the house of Gregg & Ford, there was a regular business and to a large extent carried on. It is in proof that the defendants drew other drafts on Gregg & Ford about the same period that matured about the time the one sued upon was payable, and that the drawees paid them—that the draft in suit was placed in the hands of Gregg & Ford, the parties on whom the draft was drawn before its maturity, to await payment—that it was in other hands some days before it was due and was so held until it was protested nearly two months afterwards. McDaniel swears that, before drawing the draft, he had the agreement of Gregg & Ford not only to

draw this draft but others. This statement Gregg denies in his evidence, and says that he refused to accept unless placed in funds to pay it. This is flatly contradicted in turn by McDaniel. Taking it that these contradictory statements of the parties themselves, like opposite quantities in algebra, destroy each other, we are thrown back upon the consideration of the facts shown in regard to the circumstances under which the draft was drawn. There was a running account between McDaniel & Co., and Gregg & Ford at the time the draft was drawn and had been for several years before. The former had made frequent shipments to the latter of cotton, hides, etc., from time to time, and had often drawn drafts upon them which had been accepted and paid. During this continued course of business it appears that Gregg & Ford frequently paid drafts drawn upon them by defendants when at the time there was nothing standing to their credit, and even when the balance of account was against them. We have seen that other drafts drawn by them, falling due about the same time with that of the one in suit, were paid by the drawees. From all the evidence in the record we come to the conclusion that the defendants, when they drew the draft sued upon, had a just right to believe that it would be duly honored, and therefore, that they were entitled to due protest and notice of the dishonor of the bill. Parsons on Bills, vol. 1 pp. 532 to 539—p. 541, and note—9 La. 127; 19 La. 370; 3 An. 385; 20 An. 43.

But on the part of the plaintiffs it is contended that the defendants are bound by a subsequent promise to pay the draft. On this subject there is some confliction in the evidence; McDaniel's statement is, that he came to New Orleans a few days before the twentieth, without being aware of the non-payment of the draft sued on; that he was engaged about making purchases when the goods he had bought in the case of shipment, were attached by the plaintiffs in this suit; that he called at once at their store and on the next day went with Mr. Peet, one of the employes of the plaintiffs, to the office of John T. Hardie & Co., his merchants, and while there, he informed Mr. Peet either himself or through Mr. Nicholson, a member of the firm of Hardie & Co., that if Gardner & Co., would ascertain by telegram whether the draft had actually been paid or not he would pay it, provided Gardner & Co. discontinued the suit, paid all the costs and replaced the goods in the same position they were before the attachment.

This statement is corroborated by Nicholson, a member of the firm of Hardie & Co., who says that the conditional offer made by McDaniel, and by himself for McDaniel, was not carried out because Gardner & Co., presented him all the bills of costs and insisted upon their payment along with the draft. The firm of Hardie & Co. had agreed, it seems, with McDaniel, to pay the draft for the firm of McDaniel &

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Co., on the terms proposed by McDaniel; and Nicholson testifies that, when the draft and all the bills of costs and expenses of the attachment were presented to him for payment, he refused to have anything to do with it. There is nothing going to show that this testimony of Nicholson is not strictly true. The evidence, we conclude, preponderates in favor of the defendants, in regard to the promise, and establishes that any offer that may have been made by McDaniel to pay the draft was made expressly on the condition that the plaintiffs should withdraw their attachment suit, pay all the costs of the proceeding and restore his goods in the condition they were before they were attached and taken out of his possession. This offer was not accepted, and the plaintiffs have no right to require the defendants to make payment solely on their own terms.

We think the judgment of the lower court correct.

Judgment affirmed.

Rehearing refused.

No. 3320.

JACOB WHETSTONE, Administrator, v. S. W. RAWLINS.

It is idle for the defendant to set up that the title of the property claimed of him is in Jacob Whetstone individually, who brought this suit as administrator, and not in the successions whose representatives are before the court, and therefore that, if he pays over the money under the judgment appealed from, he may be held liable to Whetstone hereafter. Jacob Whetstone and the other parties acting jointly with him when they consigned to defendant the cotton whose proceeds are now claimed, are bound by their judicial admissions that the money belongs to said successions. The defendant, therefore, runs no such risk as he anticipates.

The plea of prescription of three and five years is not well founded. The action does not arise *ex delicto*, but from a *quasi* contract.

Under the settled jurisprudence of this court, no damages can be allowed where the appellee joins in the appeal, however frivolous it may be.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. John M. Bonner*, for plaintiff and appellee. *E. T. Merrick, Race & Foster*, for defendant and appellant.

WYLY, J. This suit was brought by Jacob Whetstone, as administrator of the successions of John A. and Martha S. Whetstone, to recover from the defendant, S. W. Rawlins, the balance of the proceeds of thirty-three bales of cotton, sold by him as a commission merchant.

The heirs of John A. and Martha S. Whetstone undertook to settle these successions among themselves, and thus save the expense of having them administered. In pursuance of this purpose Jacob Whetstone, a son of the deceased, and his two brothers-in-law, Peyton S. Graves and Sylvester G. Parsons, shipped, in the beginning of the

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year 1866, thirty-three bales of cotton, the property of said successions, to S. W. Rawlins, to be sold by him.

This cotton was sold on the 20th June, 1866, but before the proceeds were paid over, Whetstone, Graves and Parsons disagreed about the manner in which these successions should be settled. An administrator, therefore, became necessary, and Jacob Whetstone was appointed administrator on the 10th of July, 1866, by the Probate Court of the parish of Morehouse, where the successions of John A. and Martha S. Whetstone were opened.

In the inventory, which was filed on the same day that Jacob Whetstone was appointed administrator, the thirty-three bales of cotton which had been shipped to S. W. Rawlins are embraced as constituting a portion of the property of said successions.

On the fourth October, 1866, the plaintiff demanded of the defendant the proceeds of said cotton, \$1626 29. This was refused on the ground stated in the letter of defendant of the same date, to wit:

“If the cotton shipped to me for account of Whetstone, Graves and Parsons was the property of the estate (of which I do not question), the parties to the account of Whetstone, Graves and Parsons should account to you, and you can easily control the amount in my hands by getting a draft on me for the amount due, signed by each of the parties, composing Messrs. Whetstone, Graves and Parsons, which I should be pleased that you would do, as I desire to pay over all balance as soon as possible. * * * * *

“S. W. RAWLINS.”

The administrator was not able to get the draft or order for the proceeds as requested, because Parsons would not sign it.

He was subsequently required to file an account, which he did. An opposition was made to it by Parsons on the ground, among others, that the funds in the hands of the defendant were not accounted for. The court maintained the opposition, holding that the administrator should be charged with the \$1626 29, because he knew that said funds belonging to the successions represented by him were in the hands of the defendant for several years, and he had not made sufficient effort to collect them. Subsequently, to wit: On January 29, 1870, the plaintiff brought this suit for said funds against the defendant.

The defendant in his answer admits the possession of the \$1626 29, and raises the same objection stated in his letter of October 4, 1866, that he is willing to pay over the money, but must have the consent of the consignors, Whetstone, Graves and Parsons, or some authorization from them to do so in order to protect himself. He also urges that, having held the funds in good faith and having been willing at all times to pay them over to the consignors, “*or any one entitled thereto,*”

he ought not to be compelled to pay interest thereon. The court gave judgment against the defendant for the sum claimed, with legal interest from judicial demand, and the defendant appeals. It seems to us the only interest the defendant can have, is to be protected in paying over the money from further responsibility on account thereof, as he professes in his answer to be anxious to pay over the money to Whetstone, Graves and Parsons, "or any one entitled thereto."

The successions to which the cotton belonged are certainly entitled to the proceeds, and the question is, can the defendant safely pay them over to the plaintiff or to his successors, S. A. V. Robinson and P. C. Robinson, who are now before the court as the legal representatives of John A. and Martha Whetstone.

We think he can safely do so. It is idle for the defendant to set up that the title of the property is in Jacob Whetstone, who brought this suit as administrator, and not in the successions; and therefore, if he pays over the money under the judgment appealed from, he may be held liable to Whetstone individually hereafter. Whetstone can never deny his judicial admissions in the petition that the money in controversy belong to the successions of John A. and Martha Whetstone. Nor can Parsons ever deny his judicial admissions in his petition of opposition to Whetstone's account in 1868, that the money in question belongs to said successions; nor can he dispute his testimony on the trial of this case to the effect that these funds belong to the successions of John A. and Martha Whetstone. The defendant, however, pleads in this court the prescription of three and five years in bar of this suit. In setting up this exception we can not regard him as serious in the profession contained in his answer, that he is anxious to pay over the money to the consignors, "or any one entitled thereto;" and therefore he should be excused from paying interest. The plea, however, is not well founded. The action does not arise *ex delicto*; it springs from a *quasi* contract, and is therefore not subject to the prescription pleaded.

We think the appeal was taken merely for delay, and that the appellees should have the damages claimed for frivolous appeal.

Judgment affirmed, with ten per cent. damages for frivolous appeal and all costs.

ON APPLICATION FOR REHEARING.

WYLY, J. It escaped the attention of the court, that in the answer praying for damages for frivolous appeal, the appellee joined in the appeal and prayed for an amendment of the judgment. Under the settled jurisprudence of this court no damages can be allowed where the appellee joins in the appeal, however frivolous it may be.

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It is unnecessary to grant a rehearing on the ground that damages should not have been allowed, because the appellee in answer to the application for rehearing waives all demand for damages, and consents that that part of our judgment may be stricken out.

It is therefore ordered that that part of the judgment of this court awarding damages for frivolous appeal, be stricken out, and it is further ordered that the application for rehearing be denied.

Rehearing refused.

No. 5206.

JEAN TRISCONI v. A. D. DUMAS and FRANCOIS VICTOR.

The plaintiff, having acquired the right in his own interest, during the continuance of the lease of part of a building, to prohibit the establishment of a grocery in the adjoining part of said building, in order to prevent competition with one of his own which he kept, was certainly at liberty to waive that right, and it is hard to see why such a waiver should not be a sufficient consideration for a contract entered into for the benefit of the person who desired such waiver.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Hornor & Benedict*, for plaintiff and appellee; *A. & W. Voorhies*, for defendant and appellant.

TALIAFERRO, J. This suit is brought *in solido* against the defendants upon ten promissory notes of \$83 33 each, with interest, costs of protest, etc. The notes were drawn by Dumas to the order of Victor, and by him indorsed. The defense is that the contract or agreement upon which these notes were given was without consideration, a mere *nudum pactum*, and void. The plaintiff had judgment in the court below, and the defendants have appealed.

It appears that Trisconi had leased from one Mary part of a building to be used as a grocery, with the stipulation that Mary should not lease the other part for the same business. Dumas leased this portion of the building from Mary under the stipulation imposed by Trisconi. Subsequently Dumas, desiring to embark in the same business, contracted with Trisconi for the privilege and executed the notes sued on in consideration thereof. Mary was not a party to this arrangement, but it does not appear that he interposed any objection. Trisconi had acquired the right in his own interest during the continuance of his lease to prohibit the establishment of a grocery in the adjoining part of the building to come into competition with his own. This right he was at liberty to waive, and we do not see why such waiver should not form the consideration of a contract when he chose to do so. Dumas desired the benefit of this waiver; he received that benefit from Trisconi, and could not legally have received it from any other person during the continuance of Trisconi's lease.

We think the decree of the lower court correct.

Judgment affirmed.

Rehearing refused.

No. 3701.

**NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY v.
CITY OF NEW ORLEANS et als. CHARLES MORGAN, Intervenor.**

26	478
50	417

26	478
52	435

26	478
119	186

A municipal corporation possesses two classes of powers and two classes of rights—public and private. In all that relates to one class, it is merely the agent of the State and subject to its control. In the other, it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature—its creator. Among this latter class is the right to acquire, hold and dispose of property—to sue and be sued, etc.—just as certain rights are conferred on private corporations and persons, not *sui juris*, such as minors and married women, but are not afterwards, as long as they exist, under the control of the Legislature.

A municipal corporation may own property, to and over which the Legislature has, while said corporation exists, no right or control in opposition to or independently of the will or consent of the corporation.

It is a manifest fact to all that the incorporation of such a city as New Orleans is a necessity. The multiplying and complicated interests of the compact and increasing community are such that the Legislature can not administer them; and some of them are of such a nature as not to be within mere legislative action, but are to be conducted under general rules, thus necessitating the creation of an intellectual body, with something more than governmental functions, but which do not constitute an *imperium in imperio*.

If then a municipal corporation can acquire the fee simple of property, the squares intended for the depots of the plaintiffs were so acquired, and they can not be taken by the Legislature, while the city corporation exists.

The Legislature expressly recognized and ratified the compromise of September, 1820, between the city and certain riparian proprietors in relation to the property in question, imposing conditions which were complied with. The theory that the city acquired the property simply as the agent of the State can not be accepted, because the city can own private property, and because the former owners intended to, and did, by the act of twentieth June, 1851, transfer the title thereof to the city, subject only to the uses of commerce and of the public, while so needed.

The injunction in this instance was improperly issued against the defendant—the city of New Orleans—but as the city has made no claim against the plaintiffs, a demand in reconvention can not be admitted, and a decree inhibiting the plaintiffs from occupying the property in controversy could not be granted.

Under the pleadings, all that can be done is to render judgment in favor of the city dissolving the injunction and dismissing plaintiffs' suit, leaving the parties to their rights, under the laws relative to the expropriation of property.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. J. A. Campbell and J. B. Eustis*, for plaintiffs and appellees. *George S. Lacey*, City Attorney, and *W. W. King*, for defendant and appellant. *Miles Taylor and Leovy & Monroe*, for intervenor.

WYLY, J. The question presented in this case is the same as that just decided, and for the reasons therein given.

It is ordered that the judgment herein be annulled, and the injunction be dissolved; and it is now ordered that there be judgment for the city of New Orleans, and that the prayer of the latter in reconvention be granted, and it is ordered that the plaintiffs be restrained and inhibited from occupying the property in controversy. It is further ordered that plaintiffs pay costs of both courts.

ON REHEARING.

HOWELL, J. The plaintiff company enjoined the city of New Orleans from leasing or selling, and from interfering with plaintiffs in occupying and enjoying, holding and acquiring certain lands granted to the plaintiffs by and described in the following clause of section 15 of act No. 26 of 1869, to wit: "And there is hereby granted to the said company the right to locate, construct, maintain and use a passenger depot, with office and apartments suitable for its legitimate business, upon the part or portion of the levee or streets and grounds in the city of New Orleans, bounded by Canal, Delta and Poydras streets, and a line parallel to and one hundred and fifty feet easterly from Delta street; and for the construction of a freight depot, and for other purposes of its legitimate business, to inclose and occupy the blocks of ground, parts of streets and portion of levee in said city, bounded by Girod, Water and Calliope streets, and a line parallel to and two hundred and ninety feet easterly from Water street; *provided*, said company shall not inclose or occupy that part or portion of the blocks of ground within said last named limits, which is the private property of individuals, until said company has acquired the title thereto."

The plaintiffs allege that they have acquired by purchase all of the private property within the boundaries of the said grant.

The only answer filed by the city to the original and supplemental petitions of plaintiffs in this suit has been disposed of, and is not before us; the other answers are to the intervention of Charles Morgan and this branch of the suit; but the question presented and discussed by both parties is the right of the State to make the said grant, the city claiming to be the owner of the said ground, subject only to a servitude in favor of the public as long as it may be needed for public purposes, and the State asserting absolute ownership and control of the lands as public places.

If they be "public places" in the ordinary, legal signification of these words, it may be that the State has the control asserted. We will here inquire into the rights of the city to the lands.

In 1820, the batture in that portion of the city was owned or claimed by the heirs and assignees of one Bertrand Gravier, as riparian proprietors, and there being some difficulty with the city as to the ownership and use thereof, the parties interested entered into a compromise by notarial act, in September of that year, by which it was stipulated that all lots of ground outside of a certain line should remain inalienable, and be used for no other public purposes than those for which they are naturally destinated. When, in 1836, the city was divided into municipalities, it was provided that no disposition should ever be

made of the said batture in violation of said compromise, and that the Second Municipality, in which it was situated, should not obstruct the inhabitants of any portion of the city in the free use thereof. By the continued accessions, this space of ground became inconvenient for public use, and in 1850 the Legislature repealed that portion of the act of 1836 prohibiting any disposition thereof; authorized and directed the Second Municipality to lay off two additional streets according to a certain plan; declared that the balance of the batture should be left open and so kept for the accommodation of the public and the convenience of commerce, and that in the event of the agreement of the original parties to the said compromise, for the sale of the said batture, it should be the duty of the Second Municipality to lay off in lots all not needed for streets and public purposes as above, and dispose thereof on terms to be agreed on, provided one-third of the proceeds should be appropriated to the general sinking fund of the city.

In pursuance of this act, the said parties, with the Second Municipality, which was represented by a committee, agreed by notarial act on the twentieth June, 1851, to change the destination of the said batture made in the compromise of September, 1820; that three streets should be laid out, certain squares divided into lots and sold at auction within different periods of time and on specified terms, which sale should be binding on the parties then contracting with the Second Municipality as vendors; that the proceeds be divided into three parts, one to be paid to the said original parties, one to the general sinking fund of the city, and the other into the treasury of the Second Municipality; that three specified squares be reserved for market houses, and that portion not divided into lots for sale should be (in the language of the act) "vested in perpetuity and full ownership in the said Municipality No. 2," in favor of whom the said parties, then contracting therewith, ceded and relinquished forever all their claims in and to the said batture, as well as all and every enlargement thereof or accretion thereto by new formations.

It is by this act, it is contended, the city, which has succeeded to the rights of the Second Municipality, acquired the title to and full ownership of the ground now in controversy.

The title, it would seem, was thereby vested in the city, so far as the original owners, parties to the above act, could confer it, and the property is under the exclusive control of the city, as owner, for the benefit of the inhabitants and subject to the servitude in favor of commerce, if needed, unless there is in law some such relation between the municipal corporation and the State as makes all property acquired by the corporation the property of the State, and subject to its control. Is this so?

A municipal corporation is appropriately defined to be "the investing the people of a place with the local government thereof." Salk. 183. It has no powers not conferred upon it expressly or by fair implication, by the law of the State creating it or statutes applicable to it. Both the persons and the place inhabited by them are indispensable to the constitution of such a corporation. It is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated and not common to the State or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two classes of powers and two classes of rights—public and private. In all that relates to one class it is merely the agent of the State and subject to its control; in the other it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator. Among this latter class is the right to acquire, hold and dispose of property, to sue and be sued, etc. It is true, that these rights are originally derived from the Legislature; but once conferred they are to be exercised, while it exists, at the will of the corporation, in its own, and as to its own interest, for the inhabitants, just as certain rights are conferred on private corporations and persons, not *sui juris*, as minors and married women, but are not afterwards under the control of the Legislature. Dillon on Municipal Corporations, second edition, chapter 71, § 9 A to 10 A; chapter iv., § 38–40 and notes; Cooley's Constitutional Limitations, pp. 235–6, 238.

In § 39 Mr. Dillon says: "It may assist to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe that these, as ordinarily constituted, possess, according to many courts, a double character—the one governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents or officers in the execution of corporate duties and powers. In its governmental or public character the corporation is made, by the State, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good, on behalf of the State, and not for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the Legislature is, in the nature of things, supreme and

without limitation, unless the limitation is found in some peculiar provision of the Constitution of the particular State. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality; and as to such powers and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quo ad hoc*, a private corporation, or, at least, not public, in the sense that the power of the Legislature over it is omnipotent."

Mr. Cooley, at page 238, says: "The rule upon the subject we take to be this: Where corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes, under their charter, shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an executive contract which can not be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and can not be taken away."

In 29 Vermont, p. 12, it was said: "But while the legislative power (to enlarge, restrain or even destroy municipal corporations, as the public interests may require) may be exercised over public and municipal corporations, it has uniformly been held that towns and other public corporations may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals or private corporations."

In 18 Cal. 590, Mr. Chief Justice Field, as the organ of the court, takes the ground that the real estate or private property of a municipal corporation is protected by the clause in the national constitution securing the inviolability of contracts; that all legislative authority over it must be exercised in subordination to this guarantee, and that it is subject to legislative control to the same extent, but no greater extent, than all other property in the State.

In 9 Cranch. (U. S.) 336 and 52, Mr. Justice Story expresses the opinion that, "in respect to public corporations, which exist only for public purposes, such as counties, towns, cities, etc., the Legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased." This is reiterated by Chancellor Kent, 2 Com. 305, and by Mr. Justice Washington in Dartmouth College case, 4 Wheat. 518, 663. In this last case,

Mr. Justice Story, at page 694, says: "But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith."

In 18 L. 213, it is said: "Urban property fronting on a water course is entitled to alluvion as well as rural estates; and cities may acquire *jure alluvionis*, but it must be as proprietor of the front or riparian proprietor." See also 10 An. 54, and 7 An. 505.

We are aware that very different views have been expressed by very high authority, and that some of the authors and jurists from whom we have quoted have used language susceptible of a different construction, and declared the division of municipal powers into public and private unsatisfactory; but after a careful consideration of the opinions on both sides, we have come to the conclusion that a municipal corporation may own property, to and over which the Legislature has, while such corporation exists, no right or control in opposition to or independently of the will or consent of the corporation; and we think this is consonant with justice. There is a principle involved in it—the principle that those who have to pay should have a voice in the disposal of what is paid for—a principle which is a barrier to centralized or organized power—a principle that protects every person in the control of his own private affairs—a principle which the judiciary is intended to maintain.

The theory or argument that the Legislature has absolute ownership and control of all the property and rights of a municipal corporation, because the corporation is represented in the Legislature, is not conclusive. Such representation is only in matters properly within legislative action, just as the representation of all other portions and inhabitants of the State. The private rights of the corporation are as much protected as those of individuals. And it is a fact, manifest to all, that the incorporation of such a city as New Orleans is a necessity. The multiplying and complicated interests of the compact and increasing community are such that the Legislature can not administer them, and some of them are of such a nature as not to be within mere legislative action, but are to be conducted under general rules, thus necessitating the creation of an intellectual body, with something more than governmental functions, but which do not constitute an *imperium in imperio*.

If, then, a municipal corporation can acquire the fee simple of property, we think the squares, intended for the depots of the plaintiffs, were so acquired and they can not be taken by the Legislature while the city corporation exists. The Legislature expressly recognized and

ratified the compromise of September, 1820, in which the parties, donating or destinating, acted as riparian proprietors, and in the act 257 of 1850, the section of the act of 1836, prohibiting the violation of said compromise was repealed, and the Municipality No. 2 was authorized to enter into an agreement with the said parties "for the sale of the said batture," on certain conditions which are complied with. If it be urged that the third section of said act of 1850 required the portion, not then laid off into streets, to be kept open forever for commerce, the answer is that act No. 333 of 1853 authorized the withdrawal therefrom of such as may not be needed for public uses, and this has been done by the city (which can not sue itself) in the subsequent laying off of other streets and selling of two and a half squares in the block of squares (within the State grant) nearest the river, and which have been purchased by the plaintiffs. All this is recognized by the Legislature in the act under which plaintiffs now claim, by requiring them to purchase, and by them in making the purchases. While this legislation may be construed as making such recognition, it can be invoked in aid or support of the power to make this grant, only on the theory that the city owned the property simply as the agent of the State, a theory which we do not adopt, as to this property; because we think the city can own private property, and that the former owners intended to, and did, by the act of June 20, 1851, transfer the title thereof to the city, subject only to the uses of commerce and of the public while so needed. And such must have been the opinion of the plaintiffs when they made the offer, which they allege, to purchase a part of this very ground from the city about the time this suit was instituted; and their petition seems to be constructed on the hypothesis that the city had such rights to the said property as to make a resort to the laws relative to expropriation necessary.

The act of 1850 may have been necessary to give the Municipality No. 2 the authority to enter into an agreement with the owners; but the power having been exercised and the conditions complied with, the title of said parties (which was recognized in the said act) vested by the notarial act of June, 1851, as we think, in the municipality, which then took the place of the said former owners, with all their rights, including the right to bring into commerce such portions as might become unnecessary for public use.

It is contended, however, that the case of *Parish v. Municipality*, 8 An. 145, fixes the character of the ground in question as a *locus publicus*, in the technical sense of this term, and intimates that so much of the act of 1850 as may confer any rights upon the municipality is unconstitutional. An examination of that case will show that the matter in controversy was the servitude of view and way claimed by

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plaintiff, and that the case went off on an exception that plaintiff had no cause of action. The right, therein asserted, of the Legislature to change the destination of a portion of the batture previously dedicated to the public use is not denied; but this is not inconsistent with the right of the riparian proprietor to sell his property, and his right or that of his vendor to withdraw that property from the position of a *locus publicus*, when not needed as such, under existing legislation.

The antecedent cases had reference to the legislation and the rights of parties thereunder, prior to the act of 1850 and the transfer of June, 1851, under which the rights of the city have been acquired. But in those cases the rights of riparian proprietors to the batture were recognized, subject to a public servitude, and the ownership of the city, as against said proprietor, was denied. Judge Martin, however, in 18 La. 249, contended that the formations in front of the city did not belong to owners of the lots along a certain line, but vested in the city, and he insisted that his views were sustained by the decision of the United States Supreme Court in 10 Peters 662. The majority of the court decided in favor of the riparian proprietors, and we think those parties have conveyed their rights to the portion of the batture now in controversy to the city for its inhabitants; that those rights are protected by the constitution now, just as those of the former owners were, the city having the capacity to own property for the exclusive use and benefit of the inhabitants, and having acquired all the rights of the former owners, and that the city or inhabitants can not be compelled to contribute the squares of ground in question to the plaintiff without compensation. Whether they will or will not make such contribution voluntarily, in consideration of the benefit resulting from the establishment of the railroad, is a question not pertinent here. We are to pass only on the legal rights of the parties.

In our opinion the injunction improperly issued in this case. But as the city has made no claim against the plaintiffs, our former decree was erroneous in granting a demand in reconvention and inhibiting the plaintiffs from occupying the property in controversy. Under the pleadings, all we can do is to render judgment in favor of the city dissolving the injunction and dismissing plaintiffs' suit, leaving the parties to their rights under the laws relative to the expropriation of property.

It is therefore ordered that our former decree be set aside, and it is now ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant, the city of New Orleans, dissolving the injunction herein and dismissing plaintiffs' suit, with costs in both courts, without prejudice to the rights of the parties under the laws of expropriation.

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Mr. Justice WYLY concurs in this decree for the reasons given by him in the former opinion of the court.

LUDELING, C. J., *dissenting*. In February, 1869, the General Assembly of the State of Louisiana passed an act whereby was granted to said company, "the right to locate, construct, maintain and use a passenger depot, with office and apartments suitable for its legitimate business, upon the part or portion of the levee, or streets, or grounds in the city of New Orleans bounded by Canal, Delta and Poydras streets, and a line parallel to and one hundred and fifty feet easterly from Delta street, and for the construction of a freight depot and for the purpose of its legitimate business, to inclose and occupy the block of ground, parts of streets and portion of levee in said city bounded by Girod, Water and Calliope streets and a line parallel to and two hundred and ninety feet easterly from Water street; provided said company shall not inclose or occupy part or portion of the blocks of ground within the said last named limits, which is the private property of individuals, until said company has acquired the title themselves." Learning that the city of New Orleans was about to pass an ordinance to cede away a part of the batture or levee, which, in the act of 1869 aforesaid, the State had authorized the company to use, for its freight and passenger depots, the company enjoined the city from passing the ordinance, etc.

The city claims to have the perfect ownership of the property in question, and to be alone authorized to dispose of it, without any right on the part of the State to control its disposition. If it were conceded that the city had a perfect title, as owner, to the batture, its pretension to absolute control over the property, unrestrained by the General Assembly of the State, would be unfounded in law and in fact. It can not be disputed that the General Assembly has the power to abolish the charter of the city and to control its property for the benefit of the public, through other agents. As a matter of fact, the Legislature could do this if it chose, and the courts would be powerless to prevent it. And the right of the General Assembly to control property of a municipal corporation, dedicated to public use, is not less clear.

The Supreme Court of the United States said (in the case of *New Orleans v. United States*, 10 Peters, 722), "it can not be insisted that the dedication of this property to public use, whether the title to the thing dedicated became vested in the city, or only its use, could withdraw it from the political jurisdiction of the sovereign power." And in the same case it is decided that this sovereign power is the State. See p. 737.

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This right of the General Assembly is a part of the governmental or political power of the State, which is in no way subordinated to the municipal corporations. The city of New Orleans, if owner of this batture, is only the agent of the State; any control which it exercises over the property is a police or governmental power, delegated by the State, subject to its control, and to be exercised only in subordination to its will. *Police Jury vs. Shreveport*, 5 An. 661; 24 An. 242; 1 An. 167; 3 An. 306; 12 An. 515; 14 An. 406; 27 New York, the People v. Kerr, 188; *Cooley's C. L.* 191; *Dillon on Corporations* p. 70.

In *Reynolds v. Baldwin* this court said: "In the country from which we derive our ideas on the subject of municipal corporations, the charters of cities were, as their name implies, contracts entered into between the corporators on the one hand and the king or feudal lord on the other, by which liberties and franchises were bartered for personal service or money. The rights and powers which those charters conferred were of the nature of those secured to the people at large by our constitutions. They were intended to be permanent, and could not be lawfully taken away. They were, in the true sense of the word, franchises. But the relation existing between our municipal corporations and the sovereign is not the same, and it is strange that this fact should continue to be so obstinately overlooked by their officers." And the court adds, referring to the thirty-third section of the old constitution: "This provision constituted the municipal government of this city a subordinate agency for purposes of police and good order. The laws which under that provision have established and regulated the municipalities are not contracts; they are ordinary acts of legislation. The powers they confer are no longer franchises in the ordinary meaning of that word; they are nothing more than mandates, and those laws may be repealed at pleasure, except so far as their repeal may affect rights acquired by third persons under them. They are all of the same nature, and must be construed and applied in all cases like other laws." 1 An. 168.

But the city has not the fee simple or perfect ownership in the property in question; it is a public thing.

Ordinarily, the judicial admissions of parties to a suit are conclusive against them. "A judicial admission, solemnly made, can not be denied." 4 An. 416; 11 An. 710; 4 M. 280.

If this rule of evidence be not ignored, it will be sufficient to refer to the answer of the city, found on page forty-five of the record, to prove that the property in question is a public thing. The city declares "that all that portion of real estate or ground claimed by intervenor, situated above Canal street, and embraced by ordinance 1492, forms a part of the batture lying in the old faubourg Ste. Marie,

and that on or about the twentieth day of September, A. D. 1820, a certain act was entered into by and between Edward Livingston and other riparian proprietors and the city of New Orleans, wherein and whereby the entire alluvion or batture in front of the aforesaid suburb Ste. Marie, and the accretions thereafter to become attached to the same, were dedicated to public use and the purposes of business and commerce, and upon the express understanding and condition that the same should thereafter remain and continue a *locus publicus*, out of commerce, and not to be affected by any adverse claim or grant which might be set up against the same; that for many years anterior to the authentic act of dedication above referred to, and more than fifty years previous to the passage of the acts of the Legislature of the State of Louisiana referred to in the intervenor's petition, certain riparian proprietors owning property in the said faubourg Ste. Marie, without any particular form or ceremony, converted the entire batture in front of such suburb a *locus publicus*, and set the same apart for the use of the public, composed almost entirely of citizens of the United States, upon the condition that the batture thus informally dedicated should remain to be solely appropriated to that purpose." And in their original briefs the counsel for the city reiterated these admissions.

How then can the city be permitted now to deny that the property is a public thing? What are public things? The Code declares: "Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation; of this kind are navigable rivers, seaports, roads, harbors, highways, and the beds of rivers, as long as the same is covered with water." C. C. article 453.

"Things which are for the common use of a city or other place, as streets and public squares, are likewise public things." C. C. 455.

"Things, which belong in common to the inhabitants of cities and other places, are two kinds: Common property, to the use of which all the inhabitants of a city, or other place, and even strangers, are entitled in common, such as streets, the public walks, the quay; and common property, which, though it belongs to the corporation, is not for the common use of all the inhabitants of the place, but may be employed for their advantage by the administrators of its revenues." C. C. 458.

"Private estates or fortunes are those things which belong to individuals." "Les choses qui sont dans le domaine de chaque individu forment les biens et les richesses particulières." C. C. 450.

These citations from the Code show (according to my understanding), that the property in question is a public thing, and that a city can not own private estates or fortunes. All its property comes under

one of the two classes of public things mentioned in article 458. And whether the city can acquire or alienate property depends upon the will of the Legislature, expressed in the charter or some other legislative act; and this power can be revoked or resumed at will by the State.

The history of the rights of the city to this batture shows conclusively that it was dedicated to the public. In 1763 the Jesuits' plantation was confiscated and sold by the French. The first lot on the plan was sold to Pradel, and was conveyed by him to Bertrand Gravier. Gravier laid off lots on the front previous to his death. After his death the tract was adjudicated to John Gravier, one of his heirs, who sold to Edward Livingston. In 1805 a jactitation suit was brought, in the name of John Gravier, against the mayor, etc., of New Orleans, on account of the pretensions the city had set up to this property. In 1807 the Superior Court decided that the evidence in that case showed that Gravier was the riparian proprietor. In 1819 the co-heirs of John Gravier sued him to set aside the adjudication made in his favor and for a partition of the property of Bertrand Gravier. See 6 Mart. 281. In the same year the suit of Morgan v. Livingston and others was decided. It was determined in that case that there was no batture formed at the time Gravier's sales were made, and that whatever of riparian ownership he had, passed with those sales. In 1820, and in all probability in consequence of that decision, the compromise between the Gravier and Livingston party and the city was made. In all these proceedings the State, as representing the public, had never been a party.

In 1836 the city charter was amended, and this compromise was tacitly ratified by the State. In 1850 an act of the Legislature authorized the sale of two tiers of lots in front of two streets to be laid off on the batture in front of New Levee street, and directed what disposition should be made with the proceeds of the sales. The same act declares that the batture or space of ground adjoining the Mississippi river and the street to be laid off, etc., fronting said river, "shall be left open and so kept for the accommodation of the public and the convenience of commerce. Acts of 1850, p. 197.

The parties to the compromise of 1820 accepted the terms of this act, and, if not before, this batture was then dedicated to the public by all concerned. But in *Municipality v. Cotton Press*, 18 La. 230, this court, referring to the case of *Municipality No. 1 v. Municipality No. 2*, 12 La. 491, relating to this batture, says: "In that case there was an express dedication to public uses of the alluvion in front of the suburb St. Mary by a formal contract between the city and front proprietors, and the act of 1836 refers to and sanctions that compromise, and ex-

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pressly provides that the municipality of the upper section of the city of New Orleans shall not in any manner obstruct or impede the inhabitants of any portion of the city in the free use and enjoyment of their rights in the batture. With such legislative injunction, how could the municipality, with any propriety or consistency, pretend to be the exclusive owner of a *locus publicus*, which it was their duty to administer according to its destination." 18 La. 230 See also Packwood v. Walden and Cockran et al. v. Fort et al., 7 N. S. 86 and 626.

In the case of Delabigarre v. Second Municipality, decided in 1848, it had been expressly decided that the batture had been dedicated to the public use, and that the attempt of the municipality "to change the destination of the ground was a glaring usurpation of power, from which no legal effects could result." 3 An. 239. And this decision no doubt led to the passage of the act of 1850 aforesaid.

In 1851 the case of Parish v. Second Municipality was decided. In that case the plaintiff complained that the act of 1850 was unconstitutional, pretty much on the same grounds urged now against the act of 1869. This court decided that the property was a public place, and that the Legislature had the right to alter the destination. 8 An. 145. The other cases which follow adopt this conclusion without discussion. 10 An. 54; 12 An. 500; 13 An. 154; 10 Peters 662.

If an unbroken chain of decisions of this court, for upwards of half a century, can settle the question about that seemingly endless source of litigation, the batture in front of the city of New Orleans, it has been settled that the batture is a public thing.

I understand that a majority of my associates do not deny that the State alone can control "public things."

The jurisprudence of this State and most of the other States of the Union is settled that the sovereign alone has the right to control public places or to change the destination of public things. 5 La. 132; 13 La. 326; 18 La. 218; 3 An. 230; 8 An. 149. In the case last mentioned this court said: "As we held in the case of the State of Louisiana v. the Executors of McDonogh et. al., such a stipulation was at all times under the control of the Legislature, who could modify the effects of it and change the destination of the property whenever such a change became of public advantage. Its power to change the destination of it was expressly recognized by us in the case of Delabigarre v. Second Municipality. The power of the Legislature to change the destination of public places had been previously recognized in the case of De Armas v. the Mayor et als.; the Mayor v. Hopkins; New Orleans v. United States, and Municipality v. Cotton Press. These cases were all argued by the ablest counsel at the bar, and the opinions of the court were prepared with uncommon care. In two of them, Judge Martin

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dissented on other points; but the court was in all the cases unanimous in recognizing the power of the Legislature to change the destination of the quay and of the batture in front of the city of New Orleans," etc. P. 149; 5 An. 661; Cooley Lim. 552; 2 Dillon § 511; 4 Pet. 232; 45 N. Y. 234; 1 Redf. 260; 22 Miss. 13; 20 Mo. 192; 18 Cal. 490; 13 Ill. 30; 31 N. Y. 164, 202; 8 Dana 50; 12 Ill. 60; 15 Tex. 388.

If the General Assembly had the power to control the quay and batture in front of New Orleans in 1851, when and how has it lost this power?

I come now to inquire whether there be any difference in the power of the State to grant lands for depots and privileges to use the streets? I confess my inability to see any. It is the grant of the use of a *locus publicus* for a public use, in each instance. The use is specific. The dedication is defined, and no other employment of it can be made. The power of the General Assembly in appropriating money or property belonging to the public is subject to no other limitation than is imposed in the constitution. 16 Wal. 678; 21 N. Y. 597; 15 Wend. 374; 11 La. An. 338. Depots are necessities for the running and operating of railroads, and for the proper prosecution of the business in the interests of the public. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant. 46 N. Y. 546.

The decision of this case depends entirely upon whether or not the act of the General Assembly of 1869, in favor of the plaintiff, be constitutional or not. It can not be denied, that at least, there is serious grounds for doubts on the subject; and under the settled jurisprudence of this court and of the Supreme Court of the United States, that it is a sufficient reason for not declaring the law void.

I therefore dissent from the opinion and decree of the court.

No. 4980.

CITY OF NEW ORLEANS v. ROBERT J. KER.

From the proceedings in this case it appears that the order of the twelfth November, 1873, purporting to confirm and make final the judgment by default for taxes, was inadvertently rendered and was simply nugatory; and, being without force, it could not affect the validity of the judgment finally rendered contradictorily between the parties in December.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George S. Lacey*, for plaintiff and appellee. *R. J. Ker*, in *propria persona*.

HOWELL, J. This is a suit to enforce the payment of city taxes. These were the proceedings: On the seventh of November, 1873, judg-

ment by default was taken against the defendant. On the tenth the default was set aside on motion of the defendant and he filed his answer. He sets up in defense that he is not bound by law to pay the taxes assessed against him, contending that they are unconstitutional, especially the tax on income, that for the payment of interest on bonds and the park tax.

Judgment was rendered against the defendant and he has appealed. He argues, by way of exception, that the plaintiff obtained no valid judgment against him in the lower court, and the ground taken in support of this position is, that after the default was set aside and his answer filed on the tenth November, the judgment by default taken against him was confirmed on the twelfth November, and the judgment signed on the eighteenth of the same month; that notwithstanding this final judgment, a second judgment for the same cause of action was rendered against him on the third of December, 1873, and signed December the ninth. The last judgment he contends is a nullity, apparent from the record, and the first is null because a judgment by default can not be confirmed when it is set aside by motion in due time.

We think it clearly appears from the proceedings in the case that the order of the twelfth November, purporting to confirm and make final the judgment by default taken on the seventh, was inadvertently rendered and was simply nugatory; and, being without force, it could not affect the validity of the judgment finally rendered contradictorily between the parties in December.

The other questions in the case are settled in the cases of *City v. Estate of Burthe*; *Same v. Elkin*, and *Same v. Steamer Rawlins*.

And for the reasons therein it is ordered that the judgment of the lower court be amended by allowing interest thereon from thirty-first July, 1873, instead of thirty-first July, 1872, and that as thus amended it be affirmed, costs of appeal to be paid by appellee.

No. 4014.

BLANC & LEGENDRE v. WALLACE & CHOPPIN ET ALS.

The motion to dissolve the sequestration should have been made absolute. The requisite oath was not made. The affiant did not state that he feared or believed that the property on which the privilege exists would be removed out of the jurisdiction of the court, or concealed, parted with or disposed of pending this suit.

APPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. Rogers & Blanc*, for plaintiffs and appellees. *B. R. Forman*, for defendants and appellants.

LUDELING, C. J. This is a suit on a promissory note given for the price of machinery. The plaintiffs claim a privilege on the articles

Blank & Legendre v. Wallace & Choppin et als.

sold to defendants and obtained a sequestration. The motion to dissolve the sequestration should have been maintained. The requisite oath was not made. The affiant did not state that he feared or believed that the property on which the privilege exists would be removed out of the jurisdiction of the court, or concealed, parted with or disposed of pending this suit. C. P. 275; 4 R. 462; 6 An. 444; 9 An. 535; 11 R. 145. But, on the merits, the judgment of the lower court is correct.

It is therefore ordered and adjudged that the judgment be affirmed. The costs of the sequestration of this appeal to be paid by the plaintiff. Rehearing refused.

No. 4856.

CITY OF NEW ORLEANS v. ESTHER KLEIN.

The ground that the assessors and city administrators were not legally appointed, can not be urged in this proceeding. There is a law providing for the settlement of such questions.

The objection that the parish tax, the school tax and the police tax embraced in the bill are for purposes of State institutions, and are unconstitutional, because not uniform, is without force.

The constitution does not require that every tax shall be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. The taxes now in question are local taxes, levied by the city in accordance with the statutes of the State, for the objects specified as applicable to the territorial limits of the city.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George S. Lacey*, City Attorney, for plaintiff and appellee. *J. Livingston*, for defendant and appellant.

HOWELL, J. This suit is for the taxes of 1871, payable in 1872. The defense is that the taxes exceed the authority conferred; that the defendant can not be made to pay taxes for a debt created by the city before her property was brought within the limits of the city; that the assessors and city administrators were not legally appointed; that the park tax, the school tax and the police tax, embraced in the bill, are for purposes of State institutions, and unconstitutional because the tax is not uniform throughout the State, and that two of the ordinances, fixing two items in the bill, were adopted after the month of December, in which month alone the Council had power to assess any tax for the ensuing year.

The first two grounds of defense are disposed of in the case of *City v. Estate of Burthe*, just decided, except as to three-quarters of one per cent., which were authorized by special statutes on the subject.

The third ground as to the official tenure of the said officers can not be urged in this proceeding. There is a law providing for the settlement of such questions.

The next ground, as to the nature of the public park, the public

schools and the metropolitan police, we are unable to perceive the appropriateness or force of the objection. The constitution does not require that every tax shall be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. The taxes now in question are local taxes, levied by the city in accordance with statutes of the State, for the objects specified as applicable to the territorial limits of the city.

The last ground, as to the date of the ordinances being subsequent to the month of December, was disposed of in the case of the *City v. Crescent Mutual Insurance Company*, 25 An. 390.

There is error, however, in allowing interest for one year before the taxes were due.

It is therefore ordered that the judgment appealed from be amended by allowing interest thereon from thirty-first July, 1872, instead of thirty-first July, 1871, and that as thus amended it be affirmed; costs of appeal to be paid by appellee.

No. 3427.

A. W. BOSWORTH et als. v. CITY OF NEW ORLEANS.

The plaintiffs sue on an open account to recover salaries as Commissioners of Waterworks, and commissions on two millions of dollars for adjusting and settling the accounts between the Commercial Bank and the City of New Orleans.

On the thirty-first of July, 1868, the resolution which authorized the appointment of the plaintiffs was adopted. Neither that resolution nor any other resolution, law, ordinance or contract fixed any salary or compensation for the services of said commissioners. None, therefore, can be claimed. There is no implied obligation on the part of the municipal corporations, and no such relation between them and the officers whom they are required by law to select, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law, ordinance or contract.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. W. W. King*, for plaintiffs and appellees. *George S. Lacey*, City Attorney, for defendant and appellants.

LUDELING, C. J. The plaintiffs, A. W. Bosworth, Gabriel DeFeriet, Eugene Waggaman, William McCulloch and others, sue on an open account to recover salaries as Commissioners of Waterworks and commissions on \$2,000,000 for adjusting and settling the accounts between the Commercial Bank and the city, amounting, in the aggregate, to \$87,583 33, with interests and costs.

The answer contains a general denial, and further alleges that the plaintiffs assumed the duties and trust of the position with the understanding that no compensation was attached to the office or trust; that no salary or emolument is attached by law to the said position or trust assumed by plaintiffs, and that they have no right to demand compen-

sation, and it further denies that they rendered any services for which they are entitled to compensation. There was judgment against the city for \$50,248, and the city has appealed.

On the thirty-first of July, 1868, the resolution which authorized the appointment of the plaintiffs was adopted—it is as follows :

“Resolved, That the Mayor be, and he is hereby authorized to appoint a Board of Commissioners, consisting of seven members, to manage the Waterworks until such time as the City Council shall take further action.

“Resolved further, That the Mayor be and he is hereby authorized to appoint a Superintendent of Waterworks, under the control of the commissioners, as aforesaid ; provided, that all the appointments of the Mayor be subject to the confirmation of the Board of Aldermen : provided, that the said commissioners and superintendent shall hold office, under the Mayor's appointment, until such time as the Common Council may propose and mature the necessary ordinance and resolutions for the final government of the Waterworks.”

Neither that resolution nor any other resolution, law, ordinance or contract fixed any salary or compensation for the services of said commissioners. None, therefore, can be claimed by them. “There is no implied obligation on the part of the municipal corporation, and no such relation between them and the officers, which they are required by law to elect, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law, ordinance or contract.” *Dillon on Municipal Corporation* p. 287, § 169; 8 *Vert.* 284; 13 *Gray* 347 ; 19 *New York*, *Baker v. city of Utica* ; 37 *Mo.* 564.

In *Barton v. New Orleans*, Judge Land, as the organ of this court, said : “The Board of Health had no authority to establish the sanitary commission of which the plaintiffs were members. But if it be conceded that the establishment of the commission was recognized and ratified on the part of the Common Council of the city, still we are of opinion that the plaintiffs can not recover; first, because if they acted as agents for the city the law presumes that their services were rendered gratuitously ; secondly, because if they acted as officers for the city, they then accepted a public trust, to which neither fees nor emoluments were attached by any ordinance of the city; and thirdly, because there was no agreement between them and the city, either before or after the rendition of services, for the payment of fees or other compensation.” 16 *An.* 317.

Thomas Shields, a member of the Board of Aldermen, at the time the resolution of July, 1868, aforesaid was passed, testified as follows : “It was I offered the resolution in the Council authorizing the Mayor to appoint a certain number of well known citizens to take that posi-

Bosworth et als. v. City of New Orleans.

tion. In advocating the resolution I presented, the question was propounded to me by Mr. Markey and several other members of the Board of Aldermen, if it was intended that any compensation should be attached to the position of these gentlemen, and I replied, and felt authorized to reply, that no compensation of any character whatever was intended; that it was simply an honorary position, in which we called upon respectable citizens, well known in the community, to assist the members of the Council in a public duty."

Under the circumstances of this case the plaintiffs have no cause of action, which can be recognized or enforced by the courts.

It is therefore ordered and adjudged that the judgment of the lower court be annulled and reversed, and that there be judgment in favor of the defendant and against the plaintiffs, rejecting their demands, with costs in both courts.

No. 3405.

SPEARING & CO. v. SUCCESSION OF J. W. ZACHARIE.

The plea of prescription is set up against the suit of plaintiffs based upon the following instrument: "New Orleans, June 3, 1862. Due Messrs. Spearing & Co. six thousand dollars in current funds, subject to their draft or drafts, at not less than sixty days after sight."

This instrument is virtually an unconditional promise to pay a specific sum in current funds sixty days after demand. It contains substantially the elements of a promissory note. Therefore the action is barred by the prescription of five years.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Ruddecke & Upton*, for plaintiffs and appellants. *James Lingan*, for defendant and appellee.

WYLY, J. This suit is based on the following instrument:

"NEW ORLEANS, June 3, 1862.

"Due Messrs. Spearing & Co. six thousand dollars in current funds, subject to their draft or drafts at not less than sixty days after sight.

"J. W. ZACHARIE,

\$6000.

"pp. Robert Jump."

The court sustained the plea of prescription of five years and dismissed the suit. The plaintiffs appeal. The question is, is the above instrument a promissory note? If so, the action is barred by prescription. It is an acknowledgment of an indebtedness of a specific sum, subject to (or payable), on payee's draft or drafts, at not less than sixty days after sight. It is virtually an unconditional promise to pay a specific sum in current funds sixty days after demand.

In our opinion it contains substantially the elements of a promissory note. 22 An. 28; Parsons on Notes and Bills, chapter 2, pages 23-24.

It is therefore ordered that the judgment herein be affirmed with costs.

No. 4797.

CITY OF NEW ORLEANS v. Estate of D. F. BURTHE.

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48 853

The defendant is sued on a tax bill on real estate, which tax bill was originally two and five-eighths per cent. but subsequently reduced to two per cent. The defense is, that the ordinance under which this suit is instituted, is in violation of two prohibitory laws, to wit: Act. No. 7, 1870, limiting plaintiff's right to tax to one and three-quarters per cent., and act 68 of same year fixing the limit at two per cent., wherefore, said ordinance is null and void; the two acts were approved on the same day.

It is clear that the demand being only for two per cent. is not in violation of act 68.

But it is contended by defendant that the tax of two per cent. claimed, being in excess of the authority conferred by act. No 7, limiting the taxing authority to one and three-quarters, can not be collected in whole or in part, while the plaintiff contends that the act No. 68, conferred the authority to collect the two per cent. claimed.

There is no absolute conflict between the two enactments. The first in order of the two acts is the City Charter, and confers on the City Council authority to levy an annual tax for the purposes of said act which should not exceed three-quarters of one per cent, "provided, it be sufficient to pay the interest on the consolidated debt and rail road bonds issued by the city of New Orleans." At the same time, there are other special statutes making it the duty of the city to levy and collect taxes known as the metropolitan tax and park tax, which are not mentioned in the designation of the taxes which, in the aggregate, should not exceed one and three-quarters per cent.

The act No. 68, need not be considered as a repealing or amending statute, but as fixing a limit in general terms to powers already conferred. If the city charter (act No. 7) were the only statute conferring authority to levy taxes, the defense set up might be good, but the " proviso" in said act implies that a higher rate might be necessary.

There are many other statutes conferring the authority and making it the duty of the city to levy certain special taxes, which, all taken together, exceed two per cent, as made out in the original bill against the defendant; but the city has remitted that excess and is now only seeking to collect the two per cent. The city can well remit the excess and demand what it has authority to impose.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Geo. S. Lacey*, City Attorney, and *A. C. Lewis*, Assistant City Attorney, for plaintiff and appellee. *J. Livingston*, for defendant and appellant.

HOWELL, J. The tax bill against the defendant for 1870, due in 1871, on real estate, was made out at the rate of two and five-eighths per cent., but before the publication of the list of delinquent tax payers, which by law was a citation, this court decided in the case of *State, ex rel. Board of School Directors v. Mayor et als.*, 23 An. 358, that the City was limited to a tax of two per cent. by section seven of act No. 42 of 1871, which is a re-enactment of section 8 of act 68 of 1870; whereupon the City Council adopted ordinance No. 870, (which was printed on the back of the said tax bill) remitting the excess of five-eighths, and the bill thus reduced, was then published. The defendant appeared in court and filed an answer, alleging that the ordinance under which the suit is brought is in violation of two prohibitory laws, to wit: Act No. 7 of 1870, limiting the plaintiff's right to tax to one and three-quarters per cent., and act No. 68 of same year, fixing the limit at two per cent. and is therefore void.

It is clear that the demand being only for two per cent. is not a vio-

lation of the second act, and we are to determine whether or not this demand can be enforced under the legislation of 1870.

The two acts were approved on the same day. It is contended by defendant that the tax claimed being in excess of the authority conferred by act No. 7, can not be collected in whole or part; while the plaintiff contends that the act No. 68 conferred the authority to collect the two per cent claimed.

In the cases of the School Board, 23 An. 358, above cited, and of the City v. Crescent Mutual Insurance Company, 25 An. 390, the right of the City to collect to the extent of two per cent. was recognized, and perhaps we might well consider the question settled. But as there is no absolute conflict between the two enactments it is not out of place to examine them in this connection. The first in order of the two acts is the city charter, and confers on the Council authority to levy an annual tax for the purposes of said act, which added to certain specified special taxes, required by the laws which created the debts, should not exceed one and three-quarters per cent., "provided it be sufficient to pay the interest on the consolidated debt and rail road bonds issued by the City of New Orleans," these being the special taxes above referred to. At the same time there were other special statutes, making it the duty of the city to levy and collect taxes known as the metropolitan tax and park tax, which were not mentioned in the designation of the taxes which in the aggregate should not exceed one and three-quarters per cent. In this state of legislation it is a reasonable construction to hold, that the general law No. 68, limiting the taxing power of city and municipal corporations to two per cent., was intended to restrict the taxes, for all the objects for which the city was required to assess a tax, to two per cent. The act No. 68 need not be considered as a repealing or amending statute, but as fixing a limit in general terms to powers already conferred. If the city charter (act No. 7) were the only statute conferring authority to levy taxes, the argument of defendant might be good, but that the proviso in act No. 7 implies that a higher rate might be necessary.

We find, however, that there are many other statutes conferring such authority and making it the duty of the city to levy certain special taxes, which all taken together exceed two per cent., as made out in the original bill against defendant, but under the decision of this court, as already stated, the city remitted that excess and is now seeking only to collect the two per cent.

We are of opinion that the demand is legal. The authorities cited by defendant upon the excess or abuse of authority, refer to sales made for excessive taxes. The principle is different where the tax is in process of collection. The portion that is authorized may be collected.

See 43 Ill. 456. The city can well remit the excess and demand what it has authority to impose.

The defendant objects further, that he can not legally be required to pay a tax levied to meet a debt, which existed before the territory where his property is situated was annexed to the city of New Orleans.

This question was settled adversely to defendant, in the case of *Layton v. City of New Orleans*, 12 An. 515, and confirmed in *Wallace v. Shelton*, 14 An. 505. We can see no reason to disturb it.

Judgment affirmed.

Rehearing refused.

No. 4972.

CITY OF NEW ORLEANS v. LOUISIANA MUTUAL INSURANCE COMPANY.

Act No. 57 of 1874, can have no effect in this case, which is to collect taxes in 1872 for 1873, as laws can not have a retroactive effect under the constitution of this State.

If the act of 1874 was to interpret the acts of 1871 and 1872, as seems to be its purpose, it is unconstitutional, because trenching upon the jurisdiction of the judiciary. To interpret laws is not within the powers of the General Assembly. It is not a legislative, but a judicial function.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Geo. S. Lacey*, City Attorney, for plaintiff and appellee. *O. T. Bemiss, Finney & Miller*, for defendant and appellant.

LUDELING, C. J. This case is identical with the case of the City of New Orleans v. The Salamander Insurance Co., decided by this court in 1873, and reported at page 650 of the 25 Annual.

We adhere to the views there expressed. Act No. 57 of 1874 can have no effect in this case, which is to collect taxes levied in 1872 for 1873, as laws can not have a retroactive effect under the constitution of this State.

If the act of 1874 was to interpret the acts of 1871 and 1872, as seems to be its purpose, it is unconstitutional, because trenching upon the jurisdiction of the judiciary. To interpret laws is not within the powers of the General Assembly; it is not a legislative, but a judicial function.

It is therefore ordered that the judgment appealed from be affirmed with costs.

In this case there is an error in the decree in allowing interest from July 31, 1872. It should have been allowed only from July 31, 1873, and the appellee having consented, that the error might be corrected, it is accordingly ordered that the decree heretofore rendered be modified by allowing interest only from July 31, 1873.

Rehearing refused.

No. 4962.

JULIUS SOCHA v. MRS. LOUISA RENALDO.

In the order of seizure and sale appealed from, the court *a qua* erred in granting five per cent. for attorney's fees, as the amount of attorney's fees was not fixed in the act of mortgage. The right of plaintiff to sue for attorney's fees hereafter is reserved to him.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Braughn & Buck*, for plaintiff and appellee. *Dalton & Walker*, for defendant and appellant.

WYLY, J. This is an appeal from an order of seizure and sale. The court erred in granting the order for five per cent. attorney's fees, as the amount of attorney's fees was not fixed in the act of mortgage. The right of plaintiff to sue for attorney's fees hereafter is reserved to him.

It is therefore ordered that the judgment herein be amended by striking out that part allowing attorney's fees, and as thus amended it is affirmed, appellee paying costs of appeal.

No. 3330.

BUTCHERS' BENEVOLENT ASSOCIATION v. R. KING CUTLER.

A party can not be enjoined from prosecuting suits for claims, whether well founded or not. On the defense the parties can be heard and their rights adjusted. The intimation that a party fears he may not obtain justice before a particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction.

The judge *a quo* dismissed the rule, and on the trial of the merits dissolved the injunction, with \$100 for counsel fees. As no evidence was admitted on the trial of the motion, in reference to any damages, and the motion should have been sustained, no damages can be allowed. This is not the class of cases in which damages may be given without special proof. The plaintiffs and their securities are liable on their injunction bond.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. A. N. & H. N. Ogden*, for plaintiffs and appellants. *W. B. Hyman* and *A. T. Steele*, for defendant and appellee.

HOWELL, J. The plaintiffs enjoined the defendant from further prosecuting seventy-two suits, instituted by him against as many butchers and dealers in live stock, before the eighth justice of the peace in said parish, for professional fees, on the ground that they, the plaintiff association, had, in behalf of the said several defendants, made a contract with defendant in this case for a fixed sum, to defend and prosecute all suits of a certain character in which the said parties might be interested, and that the plaintiffs are the warrantors of said parties. A motion was made to dissolve the injunction on the ground, among others, that the petition disclosed no cause for an injunction.

This motion should have prevailed. A party can not be enjoined from prosecuting suits for claims whether well founded or not. On

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48	942
26	500
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Butchers' Benevolent Association v. Cutler.

the defense the parties can be heard and their rights adjusted. The intimation that a party fears he may not obtain justice before the particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction.

The judge *a quo* dismissed the rule and on the trial of the merits dissolved the injunction with \$100 for counsel fees. As no evidence was admitted, on the trial of the motion, in reference to any damages, and the motion should have been sustained, no damages can be allowed. This is not the class of cases in which damages may be given without special proof. The plaintiffs and their sureties are liable on the injunction bond.

It is therefore ordered that the judgment be annulled by striking therefrom the damages awarded, and as thus amended it be affirmed.

Appellee to pay costs of appeal.

No. 3262.

FARGASON & CLAY v. W. B. JOHNSON & SON. JOHN WILLIAMS & SONS, Intervenor.

As to third parties, privilege can have no effect unless duly recorded. This is the settled jurisprudence of this State since the adoption of the constitution of 1868. There is, in this instance, no evidence of the registry of any privilege in favor of the intervenors. It is not necessary therefore to discuss the effect of the possession of the railroad receipt for the cotton on which a privilege is claimed.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Given Campbell and J. Ad. Rozier*, for plaintiffs and appellants. *A. Robert*, curator *ad hoc*, for absent defendants. *Clarke, Bayne & Renshaw*, for intervenors and appellees.

LUDELING, C. J. The plaintiffs attached thirteen bales of cotton as the property of their debtors, while in the actual possession of the carrier, the New Orleans, Jackson and Great Northern Railroad Company. The third opponents intervened and claimed a privilege on the cotton for advances made and for plantation supplies, and alleged that they had the railroad receipt for said cotton, which is claimed to be equivalent to a bill of lading.

As to third parties privileges can have no effect unless duly recorded. This is the settled jurisprudence of this State since the adoption of the constitution of 1868. There is no evidence of registry of any privilege in favor of the intervenors. *D. J. Edwards v. Wilkinson*, 25 An. It is not necessary therefore to discuss the effect of the possession of the railroad receipt for the cotton.

It is therefore ordered that the judgment of the lower court be annulled, and that there be judgment rejecting the intervenors' demands.

Fargason & Clay v. Johnson & Son.

It is further ordered that the property attached be sold to satisfy the judgment rendered, by the district judge, in favor of the plaintiffs and against the defendants, W. B. Johnson & Son, and the costs in the attachment proceedings; and that the costs of the intervention, in the district court, and of this appeal, be paid by the intervenors.

WYLY, J., *dissenting*. The evidence in this case satisfies me that by special agreement W. B. Johnson & Son pledged the cotton in question to secure John Williams & Sons for advances made to them. John Williams & Sons were in possession of the bills of lading, or the railroad receipts, about two weeks before the cotton was attached by the plaintiffs. Holding the bills of lading, they held the legal title of the property, and the possession of the railroad was for them, and in effect their possession. The moment the bills of lading fell into the hands of John Williams & Sons they acquired in law the possession of the property; and the antecedent agreement to pledge ripened into a complete contract of pledge. Holding the cotton in pledge when the attachment was levied, the right of John Williams & Sons was not lost for want of registry, because under the laws of this State no registry is necessary to preserve or give effect to the contract of pledge.

I think the court below did not err in giving the cotton to the intervenors, the pledgees; and therefore I dissent from the opinion of the majority of the court in this case.

Rehearing refused.

No. 3518.

C. C. THAYER v. RUFUS WAPLES.

This is a suit in damages on the allegation of having been maliciously ejected from leased premises. When a tenant denies the title of his landlord, the relation between them is severed, and the right of entry by the landlord is complete, but the entry must be effected under the law.

In this case it is not necessary to decide whether the manner of getting possession was proper or not, as the facts show that plaintiff was not damaged thereby. He failed to pay his rent, and under our law and jurisprudence the defendant was justified in seizing for the rent and attaching the property subject to the lease. In doing this in a legal manner, the defendant did not render himself liable in damages.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Sambola & Ducros* and *Charles A. Conrad*, for plaintiff and appellee. *H. O. Miller*, for defendant and appellant.

HOWELL, J. The plaintiff leased from the defendant the store No. 47 Camp street for an auction mart, from first February to first September, 1870, at \$100 per month, payable in advance. Failing to pay the rent for the month of April, the defendant instituted suit on the

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fourteenth of said month before a justice of the peace and caused the contents of the store to be provisionally seized, a keeper being put in charge of the premises. On the sixteenth, plaintiff (Thayer) answered, denying indebtedness to the defendant (Waples), and averring that if any rent be due, "the same is due to Mr. Conrad, the owner of the property," and not to Waples, and reserved his right to sue for damages for a malicious suit on the part of Waples. On the fourth day after the seizure the constable closed the store. The goods seized, belonging to third parties, were delivered to the owners by consent of both parties to the suit. On twentieth April, judgment with privilege was rendered in favor of Waples, and signed on the twenty-third. On twelfth May a devolutive appeal was taken, and on twentieth June the judgment was affirmed. After the judgment was rendered by the justice of the peace, the keys were delivered by the constable to Waples, who on twenty-seventh April gave a written lease of the premises to the Hibernia Bank, which took possession about the first of May. On twenty-first of said month (May, 1870) this suit was instituted for damages, in the sum of \$10,000, upon the allegation that the defendant maliciously instituted suit in the justice's court in order to destroy his business, eject him from the premises and rent them more advantageously to the Hibernia Bank, averring that he (Thayer) failed to pay the rent for April because he was disappointed in some of his arrangements, and suit having been instituted in the United States Circuit Court against Waples for the said property, to which he (Thayer) was made a party, he had doubts as to the propriety of paying Waples.

Upon this last point it may be remarked that the Conrad suit was filed in February, and judgment was asked against Thayer, the occupant, in case he made no disclaimer. This he did, and paid Waples the rent for March, after which he filed his answer (in April) denying the title of his lessor. The question is, is he entitled to damages under the circumstances? When seizure was made by the constable, he could have protected himself by payment into court or giving bond under article 1127 C. P., and continued his business. But it is claimed by the defendant (Waples) that when the plaintiff denied the title of the lessor, the relation of landlord and tenant was severed, and the tenant, if he continued in possession, would be a trespasser, and that as the premises were in the control of the officers of the law, he, the landlord, did not violate the law or the rights of the recanting tenant by assuming possession of his property.

The authorities cited hold the doctrine that when a tenant denies the title of his landlord, the relation between them is severed and the right of entry by the landlord is complete, but the entry must be

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effected under the law. In this case it is unnecessary to decide whether the manner of getting possession was proper or not, as the facts show that plaintiff was not damaged thereby. He failed to pay his rent, and under our law and jurisprudence the defendant was justified in suing for the rent and attaching the property subject to the lease. In doing this in a legal manner, the defendant did not render himself liable in damages. It does not appear that the subsequent failure of the plaintiff to reopen the place for his business caused him any damage. He does not show that he made the necessary effort to get his premises released from the law and regain the occupancy thereof.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

No. 3481.

JAMES J. O'HARA v. JOHN KRANTZ.

The plaintiff's contract with the city of New Orleans did not embrace the work for which payment is sought in this suit, and the defendant was making the improvement himself with the assent of the city authorities, when he was interfered with by the plaintiff officiously completing the work defendant had begun, in despite of his opposition.

There may be hardship involved in the result which enriches the proprietor at the plaintiff's expense, but, however it may or should recommend itself to the conscience of the proprietor, it is a hardship of the plaintiff's own seeking, which can not be judicially remedied.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Jury trial. *Hornor & Benedict*, for plaintiff and appellee. *J. A. & V. J. Rozier*, for defendant and appellant.

LUDELING, C. J. This is an action for \$637 49, the alleged price claimed for the construction of a brick banquette in front of defendant's property. The plaintiff's contract with the city did not embrace this work, and the defendant was making the improvement himself, with the assent of the city authorities, when he was interfered with by the plaintiff officiously completing the work defendant had begun, in despite of his opposition.

There may be hardship involved in the result which enriches the proprietor at the plaintiff's expense, but it is a hardship, which, however it may or should recommend itself to the conscience of the proprietor, can not judicially countervail the higher consideration of public policy. The hardship is of the plaintiff's own making. 10 An. 11.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant, rejecting the plaintiff's demands, with costs.

Pike v. Merchants' Mutual Insurance Company.

No. 3418.

W. S. PIKE, Assignee v. MERCHANTS' MUTUAL INSURANCE COMPANY.

On the twenty-first of April, 1868, the plaintiff wrote to Pemberton, president of the Merchants' Mutual Insurance Company, a letter to effect a policy on the steamer Texas. In that letter he said: "By agreement with Darden, he (Darden) was to insure the steamer and to transfer policy to me to the extent of \$5000. Darden effected insurance, failed to pay for the policy, say, \$957 75, which I paid myself. Darden has since fraudulently sold his interest in the steamer as acquired from me, and she is now in the hands of the United States Marshal for debts contracted since sale and will be sold to morrow. As I have paid for the policy and have now identically the same interest in the steamer that I had when the policy was taken, I desire to have the policy continued to the time of its expiration for the interest transferred to me, say, \$5000." The policy referred to was to run to the twenty-fifth of November, 1868. On the twenty-third of September of the same year the vessel was totally lost by a peril insured against.

It appears that on the twenty-third of April, Pemberton had acknowledged receipt of plaintiff's letter of the twenty-first of the same month and said in a postscript: "The risk on steamer Texas, to continue in force under the clauses and conditions of policy No. 2500. But in the meantime, on the twenty-second of April, during the interval elapsing between the date of plaintiff's letter and that of Pemberton's answer, the vessel, in accordance with admiralty proceedings, had been sold, and the proceeds were distributed in a *concurso* of claimants. Under such circumstances, the answer of Pemberton had not the effect of continuing the insurable interest of the plaintiff, whose privilege and interest had been divested by the marshal's sale.

Such a defense is not precluded by the doctrine of estoppel. The letter of Pemberton did not change plaintiff's rights, or cause him to act so as to alter his previous position. It did not create a right or confer one which did not previously exist. It simply proposed to continue such rights as the plaintiff had under the policy. But, after the marshal's sale, the plaintiff could have no right under that policy. His interest was transferred from the vessel to the proceeds. No new contract of insurance was made; no new or additional premium paid. The parties were simply mistaken as to the continued existence of plaintiff's insurable interest.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hays & New*, for plaintiff and appellant. *A. Voorhies*, for defendant and appellee.

HOWELL, J. The first important question in this case is, whether or not the plaintiff has an insurable interest in the property lost. He asserts it to be shown by the following correspondence:

"NEW ORLEANS, April 21, 1868.

"John Pemberton, Esq., President:

"DEAR SIR—As assignee of the creditors of Hawes & Bowen, I sold their interest in the steamer Texas to J. C. Darden, a member of the firm of C. Turner & Co., for the sum of \$10,000, payable as follows: cash \$5000, and Darden's three drafts on and accepted by Messrs. J. C. Turner & Co., each for \$1666 66, payable in one, two and three months from date, with vendor's privilege on the steamer until final payment. The acceptances of J. C. Turner & Co., as they matured, were protested and were unpaid. By agreement with Darden, he was to insure the steamer and was to transfer policy to me, to the extent of \$5000. Darden effected insurance, failed to pay for the policy, say \$957 75, which I paid myself.

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"Darden has since fraudulently sold his interest in the steamer as acquired from me and she is now in the hands of the United States Marshal for debts contracted since sale and will be sold to-morrow. As I have paid for the policy and have now identically the same interest in the steamer that I had when the policy was taken, I desire to have the policy continued to the term of its expiration for the interest transferred to me, say \$5000.

" Respectfully your obedient servant,

" WM. S. PIKE, Assignee."

To which Pemberton replied :

" Office of the Merchants' Mutual Ins. Co.

" No. 104 Canal street.

" NEW ORLEANS, April 23, 1868.

" Wm. S. Pike, Esq., New Orleans :

" I am in receipt of your letter twenty-first instant, referring to insurance on steamer Texas. The contents of your letter are duly noted.

" Respectfully your obedient servant,

" JOHN PEMBERTON, President."

" P. S.—The risk on steamer Texas to continue in force under the clauses and conditions of policy No. 2500.

" JOHN PEMBERTON, President."

The premium was paid before the institution of the proceedings in admiralty and none has since been paid or tendered. The vessel was sold in said proceedings on the twenty-second of April, and the proceeds distributed in a *concurso* of claimants. The vessel was totally lost on twenty-third September, 1868, by a peril insured against. The policy referred to in the correspondence, was to run to the twenty-fifth November, 1868.

Did the letter of Pemberton have the effect of continuing the insurable interest of the plaintiff? We think not.

The marshal's sale divested the privilege and interest of plaintiff. R. C. C. 3239, 3240. But he contends that the doctrine of *estoppel in pais* precludes the defendant from making such a defense. This is an error. "The rule of law is clear, that when one, by his own words or conduct, willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time." 6 A. and E. 469.

"The estoppel is allowed to prevent fraud and injustice, and exists whenever a party can not in good conscience gainsay his own acts or assertions." 3 Hill, 225.

The letter of Pemberton had no such effect. It did not change plaintiff's rights or cause him to act so as to alter his previous position. It

Pike v. Merchants' Mutual Insurance Company.

did not create a right or confer one which did not before exist. It simply proposed to continue such rights as the plaintiff had under the policy. But after the sale by the marshal, plaintiff could have no rights under that policy, as the sale divested all interest which he had in or to the vessel and transferred it to the proceeds. No new contract of insurance was made between plaintiff and defendants—no new or additional premium paid. The parties were simply mistaken as to the continued existence of plaintiff's insurable interest after the marshal's sale. The letter of defendants having been written and received after the said sale, it can not be justly considered that plaintiff's acts or rights in reference to the protection of his interests, were affected or influenced by said letter.

Judgment affirmed.

No. 2973.

MRS. J. LAVERGNE, Tutrix et al., v. MRS. NUMA LACOSTE.

This suit is for the payment of a wall designated as A, for the value of a wall designated as B, and damages for closing windows or apertures in wall A. When wall A was built with windows by Blasco, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always have made the wall a wall in common by paying for the half of its costs.

Subsequently Blasco sold the lot to the plaintiff, with the windows still in existence, and plaintiff purchased from Burgunder said adjoining lot upon which the wall rested for half of its thickness. Some years after, the plaintiff sold to defendant the Burgunder lot, the windows continuing open in the wall and the deed remaining silent concerning them. This sale did not relieve the owner of the Burgundy lot from paying for the wall in common, whenever he might desire to use it.

The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell this wall, but only the lot which he had bought from Burgunder.

There can be no question of servitude in this case. The wall belonged to plaintiff in full ownership, until the owner of the contiguous lot should pay for the half of it, and this right would exist so long as that wall stood. When paid for, the owner of the contiguous lot became the joint owner of the common wall and could use it as owner. He could therefore close the windows in order to use the wall as a wall in common.

It is evidently in derogation of common right to permit a man to appropriate the land of another without paying for it. But the law provides a *quid pro quo* to the proprietor whose rights of property are thus invaded, by giving him the right always to make it a common wall by refunding one-half of the cost thereof.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. Bermudez*, for plaintiff and appellant. *Johnson & Denis*, for defendant and appellee.

WYLY, J. This case is correctly stated by the learned judge *a quo*, and is as follows:

In 1841 one Blasco, being the owner of the lot now possessed by the plaintiffs, built a certain wall, half on his own lot and half on that of his neighbor. This was built at the exclusive cost of Blasco, his neighbor Leroy refusing to contribute towards its erection. In this

26	507
44	490

26	507
109	115

wall Blasco left three openings for purposes of ventilation. The plaintiffs derived title to the lot now owned by them from Blasco in 1859. In the same year, and subsequent to the purchase from Blasco, the plaintiffs acquired title to the contiguous lot owned by Leroy at the time the wall was built; and in 1866 they sold the Leroy lot to the defendant, Mrs. Emma Lacoste.

To understand plaintiffs' claim, it is proper to say that the wall which constitutes the boundary between themselves and the defendant is to a certain extent, to wit: forty-eight feet in length, one-half on their ground and the other half on the lot of the defendant; the remainder of the wall, measuring seventy-eight feet and six inches, rests exclusively on the lot of the plaintiffs. At one point this last mentioned part of the wall does not reach the dividing line. It is described thus in the petition: A "triangular strip of ground, measuring at its base one inch and four lines, and narrowing as its altitude extends to its apex on the rear line of said lot, a distance of seventy-eight feet six inches." This space outside of the wall is almost imperceptible, and it grows less until it reaches the line at the other end, seventy-eight feet six inches distant.

For convenience we will designate that part of the wall resting equally on the contiguous lots, a distance of forty-eight feet, as wall A. and that part resting entirely on plaintiffs' lot, seventy-eight feet, as wall B.

The defendant sought to make these walls walls in common, and the plaintiffs brought this suit to compel him to pay half the value thereof, and to restrain him from closing the three openings in the wall A, as aforesaid.

The defendant tendered the value of wall B and of the small fraction of ground extending outside of said wall, as aforesaid. And concerning the sufficiency of this sum there is no controversy. We think the defendant had the right to make this wall a wall in common, and that he should pay the plaintiffs the amount he tendered, which is, at least, the value thereof.

As to wall A, we will remark that Leroy, the owner, who refused to contribute to the building thereof, had the right, under article 672 C. C., to make it a wall in common by paying half of what was laid out for its construction; and he had the right to close the three openings therein. The moment he paid the half of the cost of the wall, his right to it became as complete as if he had helped to construct it; and, of course, if he had helped to construct it, the plaintiffs would have had no right to the openings. Plaintiffs and their vendor had the right to the openings as long as the wall belonged entirely to them; it was a right resulting from the ownership of the wall. But this ownership,

Mrs. J. Lavergne, Tutor, et al., v. Mrs. Luma Lacoste.

to the extent of one-half of the wall, was liable to be divested by the owner of the contiguous lot making it a wall in common, pursuant to article 672 C. C. The moment the provisions of this article were complied with, the builder of the wall or his vendees ceased to be the sole owners, and with it they ceased to have a right to the openings therein.

The defendant has all the rights of the original owner, who refused to contribute to the building of the wall. Besides, she is not liable to the plaintiffs for the cost of this wall. Plaintiffs, the owners of both lots, sold the defendant the one she occupies, and with the lot passed all the improvements thereon, including half of the wall in question, because half thereof rested on the lot, and it was a part of the immovable. If plaintiffs had desired to preserve their right to the openings, they should have made the reservation thereof when they made the sale to the defendant. If they wished to prevent the defendant from using half of the wall, which she bought with the lot, they should have made a limitation to that effect, in respect to these openings, in the act of sale. In the absence of an express limitation, we are bound to recognize the right of the owner to the use and employment of his property.

It is therefore ordered that the judgment appealed from be reduced to \$450, the value of wall B, which was tendered to the plaintiffs by the defendant, and as thus amended it is ordered that said judgment be affirmed, plaintiffs paying costs of both courts.

ON REHEARING.

LUDELING, C. J. In 1841 Blasco bought a lot of ground on Chartres street, upon the lower side line of which he erected a building, the wall whereof was made to rest half on his own lot and half on the adjoining neighbor's, making in that wall three openings or windows, one in the second story, another in the third story, and a smaller one in the attics.

In 1859 this lot, with the buildings and improvements thereon, was acquired by the plaintiffs, the windows being still in existence.

In 1859 the plaintiff bought from Burgunder the lot adjoining Blasco's property, upon which the wall rested for half of its thickness and upon which these windows opened.

Subsequently, in 1866, the plaintiffs, then and now minors, sold to the defendant the Burgunder lot, the windows continuing to remain open in the wall and the deed remaining silent concerning them.

Immediately after the purchase the defendant caused buildings to be erected on the whole side of the Blasco lot, resting them on the main

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wall A, and also on another wall B, which is built exclusively on the Blasco lot. Her construction resting upon wall A completely closed the window of the second story of the said division wall A.

This suit is for the payment of wall A, for the value of wall B, and for damages for closing the windows in wall A.

The judgment of the district court decreed the defendant to pay the cost of wall A and the value of wall B, and refused damages for closing the windows.

In our former opinion and decree we refused to allow the plaintiff anything for the half of the cost of wall A. This was an error. When wall A was built, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always make the wall a wall in common by paying the half of its costs. He sold the lot to the plaintiff, who subsequently sold it to the defendant. Did said sales relieve the owner of the Burgunder lot from paying for the wall in common when he desired to use it? We think not. The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell his wall, but only the lot which he had bought from Burgunder.

The plaintiff claims that the windows in wall A had existed at the time of the sale of the property to defendant for more than ten years, and were apparent signs of a continuous servitude; and as the title from them to defendant is silent as to this servitude, it must, under article 765 C. C., continue to exist. This is an error. There can be no question of servitude in the case. The wall belonged to the plaintiff in full ownership, until the owner of the contiguous lot should pay for the half of it, and this right would exist so long as that wall stood. When he paid his share of the cost of construction, the owner of the contiguous lot became the joint owner of the wall in common, and could use it as owner. C. C. 675,676; 11 An. 465.

“Neither of the two neighbors can make any cavity within the body of the wall held by them in common, nor can he affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precaution to be used, so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building.” C. C. 685. He could, therefore, close the windows in order to use the walls as a wall in common. 7 An. 685; *Fish v. Haber*.

The rule in regard to walls in common is one of public policy, and was intended to encourage the improvement of urban property. *Larche v. Jackson*, 9 M. 726. It is evidently in derogation of common right, inasmuch as it permits one man to appropriate the land of another

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without paying for it. But the law provides a *quid pro quo* to the proprietor, whose rights of property are thus invaded, by giving him the right always (*conserve toujours le droit*) to make it a common wall by refunding one-half of the cost thereof.

It is therefore ordered and adjudged that our former decree be set aside, and that the judgment of the lower court be affirmed, appellant paying costs of appeal.

Mr. Justice WYLY adheres to the original decree.

No. 3302.

GEORGE WOOD v. CHARLES HARISPE.

The exception to the petition on various grounds having been pleaded after default had been entered, was correctly dismissed by the judge *a quo*.

If the defendant Harispe is responsible to the plaintiff, it is because his agent took possession of plaintiff's property and shipped part of it to Cuba on Harispe's account, and part of it to Harispe at New Orleans. If this possession was a wrongful one, as it is alleged to be, the property came into his hands by reason of an offense which he, through his agent, had committed. His obligation towards the plaintiff would rest upon a claim for damages caused by tortious conduct and is the result of an offense which is prescribed by one year. The prescription invoked in this court by the defendant must therefore, prevail.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Randolph, Singleton & Browne, T. Gilmore & Son*, for plaintiff and appellee. *O. E. Schmidt, Denegre, & Wm. Hunt*, for defendant and appellant.

MORGAN, J. Plaintiff alleges that in the month of July or August, 1862, he owned one hundred and forty bales of cotton; that this cotton was at a place called Little Bayou Tensas, on Grand river in the parish of St. Mary, and that it was in the keeping of one N. J. Pharr. He avers that the defendant demanded and received this cotton from Pharr, and that he disposed of the same. He alleges that Harispe owes him an account of this cotton which, although demanded of him, he has refused and neglected to render. He says that the cotton in question averaged four hundred pounds per bale, and that it was worth eighty cents per pound at the time it was received by Harispe. He prays that he be ordered to account, and that he be compelled to pay him \$44,800, the value thereof.

The suit which was instituted on the nineteenth of January, 1867, commenced by attachment. The property attached was subsequently released on bond. Defendant excepted to the petition on various grounds. But as the exception was filed after default had been entered, the district judge correctly dismissed it.

The defendant then filed a general denial. The judge below, after

26	511
47	90

26	511
121	811

Wood v. Harispe.

hearing the evidence, gave judgment against him for \$5,600. Whereupon, the plaintiff moved for a new trial. The rule was fixed for the thirtieth January, 1871. On that day the court "ex officio, in order to correct an error in stating the amount of the judgment," ordered that a change be made so as to decree in favor of the plaintiff the sum of \$30,600, with interest from judicial demand, with privilege upon the property attached.

From this judgment the defendant has appealed.

If Harispe is responsible to the plaintiff it is because his agent took possession of his property, and shipped part of it to Cuba on Harispe's account, and part of it to Harispe at New Orleans. If this possession was a wrongful one, as it is alleged to be, the property came into his hands by reason of an offense which he, through his agent, had committed. His obligation towards the plaintiff would rest upon a claim for damages caused by tortious conduct, and is the result of an offense which is prescribed by one year.

The cotton is alleged to have been taken in July or August, 1862. This suit was instituted on the nineteenth of January, 1867. The prescription invoked in this court by the defendant must prevail.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendant with costs in both courts.

Rehearing refused.

No. 3463.

MARGARET A. SILLIMAN v. SHORT & MARTIN and J. A. HALL.

Short & Martin, a commercial firm, executed their notes for the rent of a store. Shortly after, Short withdrew from the partnership, and John A. Hall became a member of the former firm of Short & Martin. The new firm carried on their business in the same store leased by Short & Martin. It is clear that Hall is not bound for the notes of Short & Martin, unless he assumed to pay their debt. This assumpsit can only be established by written evidence, and that evidence has not been furnished.

The sequestration of the personal property of Hall after it had been removed from the leased premises, for the payment of the debts of Short & Martin, was unauthorized. Whether the property seized had been removed from the leased premises, within fifteen days or not, is unimportant, inasmuch as the property did not belong to Short & Martin, the lessees.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Race, Foster & Merrick*, for plaintiff and appellee. *Bentick Egan, A. Voorhies*, for John A. Hall, defendant and appellant.

LUDELING, C, J. Short & Martin, a commercial firm, executed their notes for the rent of a store. These notes were acquired in due course of business by the plaintiff. Shortly after the lease of the premises, Short withdrew from the partnership, and John A. Hall became a mem-

Margaret A. Silliman v. Short & Martin and Hall.

ber of the firm of Hall & Martin, who carried on their business in the same store leased by Short & Martin. This suit is against Short & Martin, and John A. Hall on said rent notes. There was judgment against all the defendants and J. A. Hall has appealed. It is clear that Hall is not bound for the notes of Short & Martin unless he assumed to pay their debt. This assumption can only be established by written evidence. Act of 1858, sec. 3, p. 148.

There is no written evidence of the assumption of the debt by Hall. The sequestration of the personal property of Hall, after it had been removed from the leased premises, for the payment of the debt of Short & Martin, was unauthorized. Whether the property seized had been removed from the leased premises within fifteen days or not, is unimportant, inasmuch as the property did not belong to Short & Martin, the lessees.

The right of pledge, which is given to the lessor, and which may be enforced by him by seizing the objects subject to it within fifteen days after they are taken away, can only be exercised, when they "continue to be the property of the lessee." C. C. 2709.

It is therefore ordered and adjudged, that the judgment of the lower court against John A. Hall, be reversed and that there be judgment in his favor and against the plaintiff, rejecting her demand against him with costs in both courts.

No. 5098.

STATE OF LOUISIANA v. THEOPHILE MONIE and JOSEPH FONTAINE.

26	513
50	1314

The ruling of the judge admitting the voluntary confessions of Fontaine made to the witnesses, who happened to be a constable and a justice of the peace, as against himself, was correct. But the declarations of Fontaine were inadmissible against Monie, and the judge should have instructed the jury to limit the application of said admissions to Fontaine alone.

APPEAL from the Fourth Judicial District Court, parish of St. John the Baptist. *Flagg, J.* Criminal case. *Morris Marks, H. O. Dibble*, Assistant Attorney General, for the State, appellee. *James D. Augustin*, for defendants and appellants.

LUDELING, C. J. The defendants, having been convicted of striking and cutting with a dangerous weapon, have appealed.

Two bills of exceptions to the rulings of the judge were taken. They embody substantially the same objections, to wit: That the confessions of Fontaine could not be proved by an officer, to whom it was made voluntarily; and that his confession is not evidence against Monie.

The ruling of the judge, admitting the admissions of Fontaine,

made to the witnesses, who happened to be a constable and a justice of the peace, as against himself, was correct. But the declarations of Fontaine were inadmissible against Monie; and the judge should have instructed the jury to limit the application of said admissions to Fontaine alone.

It is therefore ordered and adjudged, that the judgment of the lower court against the defendant Fontaine be affirmed with costs, and that the judgment and verdict against the defendant Monie be set aside and annulled, and that the case as to said Monie be remanded to be proceeded in according to law.

No. 4900.

THOMAS FAWCETT v. W. D. PETERSON et als.

In this suit on an open account, the plea of prescription is set up by the defense. On its face the account is prescribed, but it is alleged that before prescription accrued it was acknowledged. The evidence of this interruption is the testimony of the plaintiff, in which he refers to a letter of the agent of one of the defendants, J. M. Peterson, now deceased. This evidence was inadmissible to prove an interruption of prescription against the succession of J. M. Peterson. Besides, as to the letter above referred to, it is rather a negation than an acknowledgment of indebtedness.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. H. J. Grover*, for plaintiff and appellee. *Bentinck Egan*, for defendants and appellants.

LUDELING, C. J. This is a suit on an open account. It will be necessary only to examine the plea of prescription. On its face the account is prescribed, but it is alleged that before prescription accrued it was acknowledged. The evidence of this interruption is the testimony of the plaintiff, in which he refers to the letter of defendant, which we will notice hereafter. This evidence was inadmissible to prove an interruption of prescription against the succession of Peterson. Acts of 1858, p. 158, art. 2278 C. C.

The language of the letter written by the agent of J. M. Peterson, which is relied upon to prove a payment and therefore an acknowledgment of the debt, is as follows: "I succeeded in collecting ten per cent. of amount due you on your old claim of Jacob Barker, which you will find inclosed." It would be very difficult to distort this language into an acknowledgment of a debt due by Peterson, or to prove a payment by him of a debt acknowledged to be due by him.

It seems that J. M. Peterson was the agent of Fawcett at New Orleans, and also a member of the firm of W. D. & J. M. Peterson at Baton Rouge, which owed the account sued upon, and that he claimed to have acted as the agent of Fawcett in transmitting to him, by a bill of exchange, funds remitted by the firm in payment of said account.

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and that the loss, if any, in consequence of the dishonor of the bill, must fall upon his principal. In this letter he informed Fawcett that he had collected for Fawcett ten per cent.—a dividend declared—on Fawcett's claim on account of said dishonored bill, and which he transmitted to Fawcett. Certainly this letter negatives the idea that Peterson considered himself bound to Fawcett, and can not be construed into an acknowledgment of the debt, or of a payment by him of a debt due by himself.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant and against the plaintiff, rejecting his demands with costs.

No. 4388.

COOLEY & PHILLIPS v. P. ESTEBAN et als.

The defense in this suit based upon a promissory note is : That the defendants are not personally bound, as they acted as a committee in behalf of the Butchers' Benevolent Association.

The note reads thus : "The Butchers' Benevolent Association v. The Crescent City Live Stock and Slaughterhouse Company, No. —, Sixth District Court, parish of Orleans. We, the undersigned, hereby bind ourselves to pay *in solido*, to Cooley & Phillips, attorneys at law, the sum of one thousand dollars, as soon as the above styled suit shall have been finally decided, being for professional services to be rendered by said Cooley & Phillips to the plaintiffs in the above suit." Signed, Paul Esteban, J. T. Aycock, Dugue Verges, special committee.

This court thinks the signers of the obligation sued upon, bound themselves to pay the sum promised. There is nothing ambiguous in the written obligation ; but if, by any perversion of language, the phrase "*we, the undersigned, hereby obligate ourselves to pay,*" could be made to mean the *Butchers' Benevolent Association* obligated themselves to pay, this court would then be at a loss to know the sense of putting the words *in solido* in the obligation.

Besides, it appears from the evidence that the plaintiffs required that their fees should be secured. Of course, the Association's obligation was not secured unless the defendants were personally bound.

The plea that the suit is premature should have been filed *in limine litis*. It was too late after answer filed.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Cooley & Phillips*, personally, appellants. *H. Dugué, Fellows & Mills*, for defendants and appellees.

LUDELING, C. J. This suit is based upon the following promissory note :

"The Butchers' Benevolent Association v. The Crescent City Live Stock and Slaughterhouse Company, No. —, Sixth District Court, parish of Orleans. We, the undersigned, hereby bind ourselves to pay, *in solido*, to Cooley & Phillips, attorneys at law, the sum of one thousand dollars as soon as the above styled suit shall have been finally

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decided; being for professional services to be rendered by said Cooley & Phillips to the plaintiffs in the above suit.

“ PAUL ESTEBAN,

“ J. T. AYCOCK,

“ DUGUE VERGES,

“ Special Committee.”

The defense is that the defendants are not personally bound, as they acted as a committee in behalf of the Butchers' Benevolent Association. They further allege that \$500 have been paid on said contract. They called the said Association in warranty to defend this suit and for judgment against the Association, if any judgment should be rendered against them. There was judgment rejecting the plaintiffs' demand, and they have appealed.

We think the signers of the obligation sued upon bound themselves to pay the sum promised. There is nothing ambiguous in the written obligation; but if, by any perversion of language, the phrase, “we, the undersigned, hereby obligate ourselves to pay,” could be made to mean the Butchers' Benevolent Association obligated themselves to pay, we would then be at a loss to know the sense of putting the words, *in solido*, in the obligation. Besides, it appears from the evidence that the plaintiffs required that their fee should be secured. Of course, the Association's obligation was not secured unless the defendants were personally bound.

The language of the receipt given for the five hundred dollars paid, as well as the fact that it was paid about the time the plaintiffs were employed, and long before the maturity of the obligation, satisfy us that it was not intended to be a payment on the obligation sued upon, but a retainer, in addition to said obligation. The receipt is in the following words and figures: “Received, New Orleans, May 28, 1869, of Mr. Aycock, through the hands of J. B. Cotton, Esq., the sum of five hundred dollars, being the cash payment for our services as attorneys for plaintiffs,” etc.

The plea that the suit is premature should have been filed *in limine litis*. It was too late after answer filed, and it is certainly due now.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the plaintiffs against Paul Esteban, J. T. Aycock, the succession of Dugué Verges, *in solido*, for one thousand dollars, with five per cent. per annum interest from judicial demand and costs.

It is further ordered and adjudged that the said Paul Esteban, J. T. Aycock, and the legal representatives of the succession of Dugué Verges, have and recover judgment in their favor against the Butchers' Benevolent Association for the amount above stated, with interest and costs.

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No. 3692.

NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY v.
THE CITY OF NEW ORLEANS et als.

A thorough examination of the question has led this court to the conclusion that the State has the power to grant to a railroad company the right of way through a street in the city of New Orleans.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. J. A. Campbell and J. B. Eustis*, for plaintiff and appellee. *George S. Lacey and W. W. King*, for the city of New Orleans, appellant. *Lea, Finney & Miller*, for Pontchartrain Railroad Company, appellant. *Leovy, Monroe & Miles Taylor*, for Morgan et als.

WYLY, J. This controversy arises out of the acts of the nineteenth March, 1868, seventeenth February, 1869, and twenty-first February, 1870, granting to the New Orleans, Mobile and Chattanooga Railroad Company, for passenger and freight depots a space of ground, equal to about four squares, on the batture or levee in front of the city of New Orleans, between Calliope and Canal streets, and also granting the right to lay tracks and occupy as a railroad a strip of land extending down the levee to Elysian Fields street, and out said street to Claiborne street, and beyond it.

The plaintiffs took possession and enjoined the city of New Orleans and other parties from interfering with them in any manner. The city denied the validity of the grant, on the ground that the State had no right, title or interest in the property; and alleged that the batture and street in question belong to it, and that the State could not make the divestiture, or deprive New Orleans and its inhabitants of the use of said public place and highway, without the exercise of the right of eminent domain. And this respondent further says: "That the construction of the New Orleans, Mobile and Chattanooga Railroad by the route contemplated through the city, and the running therein passenger and freight trains, propelled by steam engines or locomotives, and the enjoyment of the grant and the privileges set forth and contained in the several acts referred to, will prevent the use of the batture and Elysian Fields street as a *locus publicus* and a highway; will destroy the dedication thereof to the public; and will give the plaintiffs the exclusive use of property which belongs to and is needed by New Orleans and its inhabitants."

The court maintained the demand of the plaintiffs and perpetuated the injunction. The city of New Orleans appeals. By consent of parties the issue, as to the Pontchartrain Railroad Company, joined as codefendants herein, is reserved from the present decision, and as to them the case is indefinitely continued. The question is: had the General Assembly the right to grant to the New Orleans, Mobile and

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Chattanooga Railroad Company, for passenger and freight depots and tracks, the property in controversy ?

If the fee or title to the soil belonged to the State, and its use, as public places, ceased to be necessary, of course the State, as the proprietor, could make the grant. But it is shown that the State had no title whatever to the property, and it is proved beyond question that its use is necessary for the public. The title of the city to this property is as clear and well established as the title of any political corporation can be to common property, or property dedicated to public use. That portion of the batture given for depots between Calliope and Canal streets was undoubtedly the property of Livingston and the other riparian proprietors who conveyed it to New Orleans, and dedicated it to public use in the act of donation or compromise of 1820. This cession and dedication was recognized and approved by the Legislature.

The batture in front of the old city was reserved for and dedicated to public use when the city was laid out in 1724; and since that time it has been used as a levee or quay. If the fee or title to the soil remained in the sovereignty of France, it passed to the United States by the cession, because France ceded forever and in full sovereignty the territory of Louisiana, with all its rights and appurtenances. The ground in question, therefore, passed to the United States if it was public property, and it was not transferred to the State of Louisiana when it was admitted into the Union, because the convention which formed the constitution acceded to the terms upon which Congress admitted the State into the Union, and by an ordinance forever renounced all right or title to the waste or unappropriated lands. This was expressly decided in the case of *De Armas*, 5 La. 207. In a controversy between New Orleans and the United States in relation to the ground in question, it was decided in 1836 by the highest tribunal of the land that the United States was without title. 10 Peters 662.

That Elysian Fields street was conveyed to New Orleans and dedicated to public use by Bernard Maigny, and has been occupied as a public highway since 1805, is not disputed.

It is shown that the occupation of these public places by the plaintiffs and the running thereon of passenger and freight trains, propelled by locomotives, prevent the use and enjoyment of them by the public, and to a great extent defeat the object of their dedication. The street and quays in question were not granted to New Orleans and dedicated to public use, to be owned and occupied by the Chattanooga Railroad.

The witness Captain Leathers says: "I am engaged in the steamboat business, commanding steamer *Natchez*. I have been engaged in the business above thirty-five years. During the last thirty years have

been making weekly landings at the port of New Orleans, discharging cargoes of cotton principally. I am very familiar with the river business which is now being done, and which has been done for many years past on the levee of this city. From the wood-work or wharves back to the houses that line the levee, say from Calliope down to Canal street, there is scarcely room enough to do the river business, by which I mean the business of receiving and shipping freight by the river Mississippi.

“I am very familiar with the levee, from Canal down to Jackson Square, which is between St. Peter and St. Ann streets. There is not more than enough of levee between Canal street and Jackson Square, and the houses that front the river and the river itself, to do the business which is now carried on by steamboats and sea going vessels.

“I am familiar with the tracks of the Chattanooga Railroad as now laid, say from Calliope street down to Jackson Square. The effect of the Chattanooga Railroad, with its passenger and freight trains and many tracks, is to leave the ships and steamboats without one-third room enough to do their business. The passing to and fro of those trains, and carrying on the business of the road, would, in my opinion, have the effect of giving to the road almost, if not entirely, the exclusive use of the batture or levee. There is constantly through the day, and all hours of the day, a large number of horses and mules engaged in transporting the river freight, to and from the levee, to the steamboats and ships and seagoing vessels; and I think the passing of the locomotive up and down the levee, would seriously interfere with the teams and drivers; there are frequently instances of those animals being frightened and running away and endangering their lives, as also the lives of others. I have seen the cars stopped at the front of my boat several times, entirely blockading my gangway and stopping my hands from putting out freight during that time. The road has left no room scarcely between the track and the boats. I am not the only one that has been subjected to this kind of inconvenience; there have been several boats and many of them. As the business of the road increases, the river business will be subjected to a corresponding increase of inconvenience, amounting almost to an entire deprivation of the use of the levee. The river business is now almost entirely blocked up from Jackson Square to Customhouse street, and from there nearly ruined by the railroad up as far as St. Joseph street, where the Chattanooga road comes to the river and occupies the entire front. To my knowledge the business of the river has been so obstructed by the use of the batture by the Chattanooga Railroad Company, that cargoes of cotton at Vicksburg have been shipped to Savannah, and many owners have shipped their cotton to other ports, which otherwise would have

come to New Orleans. In my opinion, one-half of the sugar crop will go up the river and not land here on that account. The use of the batture by the road, as laid down, is tantamount to a monopoly of the batture."

The testimony of this witness is corroborated by that of a number of other witnesses, and, indeed, the truth thereof is not controverted.

If a political corporation can be the owner of property, of which there can be no doubt, it alone can exercise the right of disposition over its property; because, the right of disposition is an essential element of perfect ownership.

If the State can grant the property of New Orleans, as attempted in the case before us, New Orleans would cease to be the owner of its own property; because, it is the owner who has the exclusive right freely to dispose of his property.

Undoubtedly the State can exercise the right of eminent domain and take for public purposes the property of political corporations, as well as the property of individuals, upon paying the owners the value of the property so taken. But, that is not the controversy here. The question is, can the State give the property of New Orleans to the Chattanooga Railroad Company? We think not.

But it is contended that as the grounds in controversy were dedicated to public use, therefore, they are a part of the public domain of the State which can be alienated by it. This is a fallacy. The fee or title was never in the State; therefore, these public places form no part of the public domain of the State. And, as we have said, the State can not grant what it does not own.

The property of the city dedicated to public use is as much its property as any that it may acquire. Indeed, the streets, walks and quays are more useful and essential to the city and its inhabitants than any other property, and they are inalienable by the State. "There can be no difference in principle between ground dedicated as a quay to public use, and the streets and alleys of a town, and as to the streets it may be asked whether the King could rightfully have granted them. This will not be pretended by any one. And it is believed that the public right to a common, is equally beyond the power of the sovereign to grant, unless he disposes of it under the power to appropriate property to national use, and then compensation must be paid." *New Orleans v. United States*, 10 Peters 662.

"The inhabitants of a town can not be deprived of their streets, as the streets are essential to the enjoyment of their property. In other words, by closing the streets the value of the buildings of the town would be greatly reduced, if not entirely destroyed. And if ground, dedicated to public use, which adds to the beauty, the health, the con-

venience, and the value of town property, be arbitrarily appropriated by the sovereign to other purposes, is not the value of the property which has been bought and sold in reference to it, greatly impaired? The value may not be reduced to the same ruinous extent, as it would be to close the streets, but the difference is only in the degree of the injury, and not in the principle involved." 10 Peters 662

If the State could grant part of the quays and street in question for depots and railroad tracks, it could grant the whole; it could grant all the streets and public places, and entirely deprive the city of access to the river and virtually make its inhabitants prisoners in their own houses. The grant to the plaintiffs differs from this only in the degree of the injury, not in the principle involved. If the State could make the grant it can authorize the inclosure of the tracks, as it did the space given for the depots, and this would virtually close the port of New Orleans, because the inclosure of the tracks, extending along almost the entire front, would cut off communication with the river and destroy the commerce of the city. But it is urged that the State can dispose of the property of New Orleans, because it granted it corporate powers and can, at will, modify or abolish the charter. It is true the powers of government delegated to the city may be revoked and its charter abolished; but it by no means follows that the property of the corporation would pass thereby to the State.

"In respect to public or municipal corporations (says Mr. Kent), which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have the right to change, modify, enlarge, restrain, or destroy them, securing, however, the property for the use of those for whom it was purchased." 2 Kent 305. Notwithstanding the power of the Legislature over the city of New Orleans its property is protected like that of any other person. Story on the Constitution, sections 1393, 1399; 2 Peters 380, 412, 413, 627, 657; 6 Cranch 67, 134; 4 Hill 144; 3 Dallas 386; 8 Wend. 85; 18 Wendall 56, 61, 63; Cooley on Limitations 487; 21 Penn. 147; 7 Wal. 289; 9 Cranch 292; 5 Paige 147; 11 Wend. 151; People ex rel. Failing v. Commissioners of town of Palatine, 53 Barbour and 3 American Law Times Reports, page 6; Constitution, art. 110; Constitution of United States, art. 1, section 10.

In *Dartmouth College v. Woodward*, 4 Wheaton, Justice Story says: "It may also be said that corporations, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, in respect to such corporations, that the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith. Can the Legislature con-

fiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses, as many municipal corporations are, does the Legislature, under our forms of limited government, possess the authority to seize upon these funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and the donees? From the very nature of our government the public faith is pledged the other way. * * * The truth is, the government has no power to make a grant, even of its own funds, when given to a private person or a corporation for special uses."

The Legislature certainly has no greater power than the sovereigns of France and Spain had in reference to the batture or levee in question. And the Supreme Court of the United States held in the case in 10 Peters referred to, where a part of the identical property was in controversy, that "the public right to the common was beyond the power of the sovereign to grant." New Orleans or its inhabitants had, therefore, a right to the levee or quay which could not be defeated, and it was "beyond the power of the sovereign to grant" this property to any one, long before Louisiana became a State, and long before there was a grant of corporate power to the city. The right to use the batture as a public place, therefore, exists independently of the delegation of corporate power, and the modifying or withdrawing thereof can in no manner affect it. So, therefore, whether the State recall the power of government delegated to the city or not is immaterial. The right of the inhabitants can not be defeated, because the proof shows that the levee is absolutely necessary to public use, and the occupation thereof by the plaintiffs impairs and greatly defeats the object of its dedication.

When a *locus publicus* becomes unnecessary for public use, of course the State can change the destination; it then becomes property in commerce, belonging to and subject to the will or disposition of the owner, whose rights were in abeyance pending the existence of the charge or servitude. But without the consent of the donors and the donees, as in the case before us, the State can not take property dedicated to one purpose and apply it to another. It can not take the batture granted to New Orleans for a quay, and to be used for the commerce of the river, and give it or any part of it to the Chattanooga Railroad. As the State was utterly without title, the grant to the plaintiffs conferred no right whatever to the property.

It is useless to argue that the grant to the railroad only gives a temporary use of the ground, and that it is subject to be recalled by the State. If the State had the right to make the grant, the plaintiffs have

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the perpetual use of the property which is equivalent to ownership, and the State can not recall or in any manner defeat it, because of the provision of the Federal Constitution prohibiting a State from impairing the obligations of a contract.

It is also absurd to argue that the grant is only the exercise of administrative power over these public places. A grant which confers exclusive use in perpetuity, and subjects the thing granted, to such debts and incumbrances as the grantees may see fit to impose, can not fairly be called the exercise of merely administrative power over a *locus publicus*.

The grant virtually changes the destination and passes the title (if the State had any to pass), because it puts the property in commerce and subjects it to the exclusive control and disposition of the plaintiffs; makes it, as the common pledge of their creditors, liable to seizure under execution. Here then, a considerable part of a *locus publicus*, proved to be essential to the existing object of the dedication, is granted to a private corporation in perpetuity; can be sold, mortgaged and otherwise subjected to their debts, and yet it is gravely argued that this is not a change of destination and a grant of the fee, but is only a mode of regulating or administering a *locus publicus*, which the State can rightfully exercise. The proposition is too absurd to require serious argument to refute it.

After carefully examining the record and considering the authorities and able printed arguments presented by the eminent counsel engaged in this litigation, we have come to the conclusion that plaintiffs must fail in their demand, for two reasons, either of which seems to be fatal to their pretensions:

First—Because the Legislature could not change the destination of these public places, bring them into commerce and subject them to the disposition of the plaintiffs, while the object of the dedication continues, and it is proved that these public places are now essential to the uses for which they were dedicated to the public.

Second—Because, if the State could have changed the destination, it could not have granted the property, because the moment the charge or servitude in favor of the public is removed, the property stands subject to the will and disposition of its owner, the city of New Orleans; and like all other property in commerce it can only be disposed of by the owner. As the State was not the owner the plaintiffs acquired no title by the grant.

Much has been said of State sovereignty and of the power of the State over the city, but we can not in this controversy adjust the matter or determine the limits of this power, because the State is not a party; and because the solution of the question is not necessary in this

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case. The State has simply passed, by the grant, whatever title it had to the plaintiffs; and this suit is simply a controversy for property between persons holding by different grants. In order, therefore, for the plaintiffs to recover, they must show a title superior to the titles of those who granted the property to New Orleans and dedicated it to public use. So, therefore, whether the public places in controversy can be administered by the State or the city, is a question that does not concern the plaintiffs. When it is ascertained, as we have, that they acquired no title by the grant, their cause of complaint is ended.

It is therefore ordered that the judgment herein be annulled and the injunction be dissolved; and it is now ordered that there be judgment for the city of New Orleans, and that its prayer, in reconvention for an injunction be granted, and it is ordered that the plaintiffs be restrained and inhibited from occupying the property in controversy. It is further ordered that plaintiffs pay costs of both courts.

HOWELL, J. The plaintiffs' counsel states the question in this case thus: "Has the State the power to make the grants of authority to the plaintiffs to lay tracks, construct depots and to occupy the batture for the purposes set forth in the acts of the Legislature relative to the corporation?"

I think the Legislature may grant such authority as to "public places;" but, in my opinion, a portion of the batture embraced in the grants has been reduced to the ownership of the city of New Orleans, and as to such portion the authority of the State is no greater than as to any other property held in private ownership, so long as the municipal corporation exists.

I therefore concur in maintaining the injunction in favor of the city only as to the property or squares shown to belong to it; but in other respects I think the judgment of the lower court should be affirmed.

MORGAN, J. I concur in the conclusions arrived at in the opinion pronounced by Mr. Justice Wyly, and reserve the right to place the grounds of my concurrence in a separate opinion.

LUDELING, C. J., *dissenting*. The opinion of my associates in this case is, according to my understanding, so diametrically opposed to the jurisprudence of this State, and most of the other States of this Union, that I am compelled to dissent from it.

The question involved in this case is simply whether or not the Legislature can control the public quay or levee of the city of New

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Orleans without the consent of the city. To show that this is the question for decision, I quote from the brief of the counsel for the city:

"BATTURE ABOVE CANAL STREET.

"The King of France, prior to the year 1763, granted to the Order of Jesuits, for a plantation, certain property lying on the Mississippi river, above Canal street, having thirty-two arpents front on the Mississippi, and running back to a depth of about fifty arpents; and for the same purpose he granted to various other persons property lying above the aforesaid thirty-two arpents. In 1763, the Jesuit plantation was confiscated by the French government, divided and sold. The first subdivision above Canal street, thus sold, contained, say seven arpents, *face au fleuve*; and five other subdivisions of five arpents each were sold in like manner. One Bertrand Gravier acquired the first subdivision about 1788; the second, lying immediately above Gravier, was acquired by Delord Sarpy, the dividing line between the Gravier and Delord Sarpy claims being now designated by Delord street. Gravier, in 1788, divided his property into squares and lots, and annexed them to the city as suburb Ste. Marie. Sarpy converted his property from rural into urban in 1806. At that time the 'big road,' now Tchoupitonas street, formed the division between the lots of ground and the batture in front thereof, which was then used by the public as a *locus publicus*.

"Edward Livingston and others, claiming, as riparian proprietors, to be the owners of the entire alluvion or batture in front of the aforesaid suburb of Ste. Marie, and the accretion to become attached to the same, by a certain act between themselves and the city of New Orleans, bearing date on or about the twentieth day of September, 1820, dedicated the aforesaid batture and future accretion to public use, and to the purposes of business and commerce, and upon the express understanding and condition that the same should thereafter remain and continue a *locus publicus*, out of commerce, and not affected by any adverse claim or grant which might be set up.

"Under, and from the time of the dedication above referred to, that portion of the batture on and over which the New Orleans, Mobile and Chattanooga Railroad Company claim to construct their buildings and to run their road, with certain exceptions, which will be shown hereafter, remained open for use as a public place, until the rights of the public to the same were interfered with by the said company.

"BATTURE BELOW CANAL STREET.

"On the sixth day of September, 1717, a charter was granted by the King of France to a corporation styled the "Western Company;" and under the auspices of that company, the ground where the old city of

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New Orleans now stands, was selected as a place for the principal settlement of the province, and the foundation of the city was laid. In 1724 and 1728, all the batture lying in front of the old city of New Orleans was laid off as a quay; and thus and otherwise, was dedicated as a *locus publicus*, and as common property, to the use of which, all of the inhabitants of the city of New Orleans, and even strangers, became entitled.

“ ELYSIAN FIELDS STREET.

“ All that portion of ground or real estate claimed by the plaintiff, and over which they seek to run their road, extending from the point of intersection of the batture lying in front of the old city of New Orleans, with Elysian Fields street, back to the point where the last mentioned street intersects with Claiborne street was dedicated by private individuals, by ordinances of the said city of New Orleans, and otherwise, as parts of a public street or highway, and for the convenience and use of inhabitants of the said city and others; and the same has been possessed, used and enjoyed, as a street highway or public place, for more than thirty years before the commencement of the present suit.”

The interference of the New Orleans, Mobile and Chattanooga Railroad Company complained of was authorized by an act of the General Assembly of Louisiana, which act the defendant alleges is unconstitutional because it divests vested rights, and authorizes the taking of private property without just compensation. It is manifest, therefore, if the General Assembly has the right to control the use of this public place, nay, even to change its destination, the interference of this company is not unlawful. As early as 1848 this court held, in *Delabigarre v. The Second Municipality of New Orleans*, that “ the sovereign alone has the right to change the destination of public places. Under the state of facts presented by the record, the attempt of the defendants to change the destination of the ground was a glaring usurpation of power, from which no legal effects could result.” The usurpation spoken of in that case was the passage of a resolution by the municipality ordering a portion of the batture to be sold.

In *Parish v. Municipality et al.*, this court said: “ We have already stated that the conditions appended to the nominal gift of the batture amounted to a dedication of it to the public, to be used as an open space, and had no other object. The defendants might, for purposes of public utility, thus deprive the city of the right of alienating the batture, or of erecting buildings upon it. But, as we held in the case of *the State of Louisiana v. The Executors of McDonogh et al.*, such a stipulation was at all times under the control of the Legislature, who could modify the effects of it and change the destination of the property, whenever such a change became of public advantage. Its power

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to change the destination of it was expressly recognized by us in the case of *Delabigarre v. Second Municipality*, 3 An. 330. The power of the Legislature to change the destination of public places had been previously recognized in the case of *De Armas v. The Mayor et als.*, 5 La. 174 and 194; *the Mayor et als. v. Hopkins*, 13 La. 351; *New Orleans v. United States*, 10 Peters 733; *Municipality No. 2 v. New Orleans Cotton Press*, 18 La. 122. These cases were all argued by the ablest counsel at the bar, and the opinions of the court were prepared with uncommon care. In two of them, Judge Martin dissented on other points, but the court was, in all the cases, unanimous in recognizing the power of the Legislature to change the destination of the quay and of the batture in front of the city of New Orleans.

“After so many solemn adjudications the defendants do not appear to have had any serious claims which they could compromise. So that, while the act of 1820 was a compromise, under the form of a donation, the act, executed in 1851, would seem to be a donation, under the form of a compromise. The plaintiffs acquired no rights under that act, the gift not being intended for them. The act passed by the Legislature in 1850 has been adduced by the defendants in support of some undefined right. It is our duty to give full effect to that act, so far as it changes the destination of a portion of the batture and authorizes the sale of it. But we deem it also our duty to disregard, as an assumption of judicial power unauthorized by the constitution, whatever in it may be considered as recognizing in the defendants any legal rights under the compromise, after the change of destination of the property.” 8 An. 149.

What is this batture, levee or *locus publicus*. upon which the defendant has built its railroad tracks and depots, under the authorization of the Legislature? It is a public place, which combines the public purposes of a landing for steamboats and vessels, a place for the temporary deposit and keeping of goods, a place for the arrival and departure of travelers and their baggage, and a public highway for vehicles employed principally in the transportation of articles of commerce. It is a public thing, according to the definition of the Code. “Common property, to the use of which all the inhabitants of a city or other place, even strangers, are entitled in common, such as streets, the public walks, the quays.” C. C 458. Wherever the public is concerned, the State is not without an interest, and may consequently legislate upon the subject. In this case, however, the Legislature has not changed the destination of the property, and the grants or privileges conferred upon the railroad company are for the convenience and benefit of the public. The testimony of witnesses has been referred to to show that the use of the batture by the railroad company will be in-

jurious to the commerce of this city. In my judgment, this testimony only proves that the witnesses are about a quarter of a century behind the age in which they live.

The defendant is a municipal corporation, which is defined to be "an investing the people of a place with a local government thereof." Such corporations are created and exist for the public advantage; they can exercise only such powers as are conferred upon them by the Legislature, which may be withdrawn from them by the Legislature at will, unless restrained by the constitution. There is no restraint on this power of the Legislature in the constitution of this State. The Legislature might take away the right of the city to legislate in any manner in regard to this batture. In the Fifth Annual our predecessors said: "The government of cities and towns, like that of the police juries of parishes, forms one of the subdivisions of the internal administration of the State, and is absolutely under the control of the Legislature." 661. Judge Dillon, in his work on municipal corporations, says: "With the exception of certain constitutional limitations, presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may change, divide, and even abolish, at pleasure, as it deems the public good require." Page 70 *et seq.*; 3 Wend. 1325; Cooley on Constitutional Limitations, p. 191-2; 14 An. 406; 12 An. 515.

Municipal corporations are mere instruments or agents of the State government; consequently, if the city of New Orleans had actually purchased the batture it could not control it as a private individual could his property. "Being a mere agency of the government, it is evident that the municipality can not itself have that complete and absolute control and power of disposition of its property, which is possessed by individuals over their own. For it can hold and own property only for corporate purposes, and these purposes are liable at any time to be so modified by legislation as to render the property no longer available." Cooley C. L. p. 235.

At page 88 of his work Judge Dillon says: "The Legislature, as trustee for the general public, has full control over the public property and the subordinate rights of municipal corporations. Accordingly it may authorize a railroad company to occupy the streets in a city without its consent and without payment. See *Clinton v. Railroad Company*, 24 Iowa 455; *People v. Kerr*, 27 N. Y. 188; *Railroad Company v. Applegate*, 8 Dana 289; *Wager v. Railroad Company*, 25 N. Y. 526, 533; *Pratzman v. Railroad Company*, 9 Ind. 467; 13 Ind. 353, 551; *Moses v. Railroad Company*, 21 Ill. 522; Cooley on Con. Lim. 555, 556; 17 N. J. Eq. 75; 17 Barb. 494; 47 Pa. State 325, 35 Cal. 325. See also Redfield on Railways, page 259 vol. I. He says: "The fee of the streets of a

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city, when it has been acquired by the municipality under the right of eminent domain, becomes a public trust for general public purposes, and is under the unqualified control of the Legislature; and any legislative appropriation of it to a public use, is not to be regarded as the appropriation of private property so as to require compensation to the city or municipality to render it constitutional."

I think the judgment of the district court should be affirmed.

ON REHEARING.

MORGAN, J. The sole question presented in this case is, has the State the power to grant to a railroad company the right of way through a street in this city?

A thorough examination of this question has led us to the conclusion that it has.

It is therefore ordered adjudged and decreed that the judgment heretofore rendered by us be avoided, annulled and set aside, and it is now ordered adjudged and decreed, that the judgment of the district court be affirmed with costs.

WYLY, J., *dissenting*. The State can grant the right of way to a railroad company; but the company can only get the land necessary for the tracks and depots by expropriation or purchase.

I had occasion to express my views on the main question involved in the case in the opinion of the court, delivered on the nineteenth of May, 1873.

I therefore dissent in this case.

TALIAFERRO, J. I concur in the dissenting opinion of Mr. Justice Wyly.

No. 3391.

GUYOL & MONTEGUT v. DUGGAN & GUYOL AND PATTON & DUGGAN.

It appears that Duggan & Guyol, against whom a personal judgment is sought, and whose cotton was sequestered, reside in the parish of East Baton Rouge. The Fourth District Court, parish of Orleans, whose proceedings are now under revision, was without jurisdiction to try this case.

This court, of its own motion, will notice the want of jurisdiction of the court *a qua*.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Randolph, Singleton & Browne*, for plaintiffs and appellees. *Lea, Finney & Miller*, for defendants and intervenors.

WYLY, J. The plaintiffs sued the defendants, Duggan & Guyol, for \$3522 67, and sequestered thirty-six bales of cotton belonging to them, on the ground that they have the furnisher of supplies' privilege thereon.

Guyol & Montegut v. Duggan & Guyol and Patton & Duggan.

The court gave judgment in favor of the plaintiffs for seven-twelfths of the thirty-six bales sequestered, or their proceeds in the hands of Patton & Duggan, amounting to the sum of \$2136 63.

From this judgment the defendants appeal.

It appears that Duggan & Guyol, against whom a personal judgment is sought and whose cotton was sequestered, reside in the parish of East Baton Rouge. The Fourth District Court, parish of Orleans, whose proceedings are now under revision, was without jurisdiction to try this case. Of our own motion we will notice the want of jurisdiction of the court *a qua*.

It is therefore ordered that the judgment appealed from be set aside, and it is now ordered that this suit be dismissed at plaintiffs' costs in both courts.

No. 5191.

JOHN HUGHES AND WIFE v. CHARLES F. CARUTHERS. MRS. ANN M. HENNEN, Third Opponent.

The motion to dismiss must be overruled. The bond being for the amount fixed by the judge *a quo* is therefore sufficient to maintain the appeal.

The lessor can not seize movables, belonging to a third person, which have been removed from the leased premises within fifteen days before the seizure. It is the property of the lessee alone which can be seized under such circumstances.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. Hornor & Benedict*, for plaintiffs and appellees. *B. R. Forman*, for defendant and appellant.

ON MOTION TO DISMISS.

LUDELING, C. J. A motion to dismiss this appeal has been made on the ground that the amount of the bond is insufficient. The bond is for the amount fixed by the judge. It is therefore sufficient to maintain the appeal.

The motion is refused.

ON THE MERITS.

LUDELING, C. J. The only question involved in this case is the right of the lessor to seize movables belonging to a third person, which have been removed from the leased premises within fifteen days before the seizure. He can not. C. C., art. 2709. It is the property of the lessee alone which can be seized under such circumstances.

It is therefore ordered and adjudged that the judgment of the lower court against the third opponent be annulled, and that there be judgment in favor of the third opponent, setting aside the provisional seizure of her property for costs in both courts.

Rehearing refused.

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1123	752
123	754

Smith v. Durbridge.

No. 5182.

**JOB SMITH v. WILLIAM DURBRIDGE. CRESCENT CITY LIVE STOCK
LANDING AND SLAUGHTERHOUSE COMPANY, garnishee.**

That the Crescent City Live Stock Landing and Slaughterhouse Company, garnishee, being an incorporated company, is subject only to the jurisdiction of the Superior District Court, and can not be brought into the Fifth District Court, may be true as regards original process, but it does not hold when the company is made garnishee. The court which rendered the judgment out of which the garnishment process springs, necessarily has jurisdiction over the party made garnishee.

The objection that Durbridge, the defendant, having sued the garnishee for the same subject matter in the Sixth District Court, no other court could obtain jurisdiction by service of citation or garnishment process, can not be maintained. The plaintiff is not bound by any proceedings to which he was not a party, and as he was not a party to the suit referred to, the decision in that case, whatever it may be, can not affect his rights.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. T. A. Bartlette*, for plaintiff and appellee. *Semmes & Mott*, for Crescent City Live Stock Landing and Slaughterhouse Company, garnishee, appellant. *Hays & New*, for civil sheriff.

MORGAN, J. Plaintiff had judgment against the defendant for \$8583, with interest and costs. He issued *fieri facias* and made the Crescent City Live Stock Landing and Slaughterhouse Company garnishees. The company answered that defendant was the owner of eighty shares of their capital stock, for which he held a certificate. These shares were seized and sold by the sheriff. The shares stood in the name of the defendant on the books of the company when they were sold. The sheriff ruled the company into court to show cause why the shares should not be transferred to Moore, Janney & Hyams, the purchasers. The rule was made absolute and the company appeal.

The first error assigned is that the garnishee, being an incorporated company, is subject only to the jurisdiction of the Superior District Court of this city, and can not be brought into the Fifth District Court. This may be true as regards original process, but it does not hold when the company is made garnishee. The court which rendered the judgment out of which the garnishee process springs, necessarily has jurisdiction over the party made garnishee.

The second objection is that Durbridge, the defendant, having sued the garnishee for the same subject matter in the Sixth District Court, no other court could obtain jurisdiction by service of citation or garnishment process. The answer to this is that the plaintiff is not bound by any proceedings to which he was not a party, and as he was not a party to the suit referred to, the decision in that case, whatever it may be, can not affect his rights.

Other grounds are stated in the brief of garnishees, but they are not contained in the pleadings, and we can not notice them.

Judgment affirmed.

Reggio v. Blanchin & Giraud.

No. 5045.

OCTAVE REGGIO, Curator, v. BLANCHIN & GIRAUD.

In the order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property, there are two fatal defects:

First—The mortgageor is not made party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Sambola & Ducros*, for plaintiff and appellee. *E. H. McCaleb*, for defendants and appellants.

WYLY, J. This is an order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property. There are two fatal defects:

First—The mortgageor is not made party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action. C. P., articles 68, 69 and 70.

It is therefore ordered that the judgment appealed from be annulled, and that petitioner be dismissed with costs.

No. 3389.

MICHAEL DUNCAN v. MARY DUNCAN.

The plaintiff in this case claims title to a certain piece of property, and alleges that the defendant is about to take forcible possession of said property, wherefore he prays that she be enjoined from doing so. The defendant admits that the property described in the petition was conveyed to plaintiff by a notarial act, but specially avers that, although the said act ostensibly shows title in plaintiff to the whole of said property, yet that she is in truth the owner of one-half of it, forming a distinct tenement, and pleads her right to the possession of it.

The defendant introduced in evidence the written act of transfer from plaintiff to herself, in which plaintiff declares: "Said house stands in my name, but I have no interest in the same. It belongs to my sister, Mary Duncan." The execution of this act was proved before a notary public and duly registered.

This written act was clearly admissible, and certain letters and parol evidence were also properly admitted to show that the plaintiff, for a length of time, during the absence of defendant in Europe, recognized her right to the property she claims, by acting as her agent and collecting and remitting to her moneys collected from time to time for the rent of that property; and also to define the property and describe its locality.

The written instrument in the nature of a counter letter, not denied by the plaintiff, nor in any manner impugned by him, is an effectual bar against the plaintiff's pretensions to ownership of the property.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Randolph, Singleton & Browne*, for plaintiff and appellant. *M. A. Dooley*, for defendant and appellee.

TALIAFERRO, J. The plaintiff proceeded by injunction to restrain and prohibit the defendant from disturbing and annoying one of his

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tenants by suing him for the rent of certain property, which the plaintiff asserts title to, and the rent of which he is entitled to. He alleges the defendant is about to take forcible possession of the property in question and he prays that she be enjoined from so doing.

The defendant puts in a general denial. She admits that the property described in the petition was conveyed to plaintiff by notarial act before William Christy, as set forth in the petition, but she specially avers that although the said act ostensibly shows title in the plaintiff to the whole of the said property, yet that she is in truth the owner of the one-half of it, to wit: The half occupied by one John Blois, the alleged tenant of the plaintiff, and comprised within the lines seventeen feet one inch and two lines front on Prytania street, and one hundred and ten feet ten inches in depth, together with all the buildings and improvements thereon; and she pleads her right to and ownership of the said property and her right to the possession of it. She introduced in evidence, in support of her right to the property she claims, the following act:

“ Know all men by these presents that I, Michael Duncan, of the city of New Orleans, hereby transfer to my sister, Mary Duncan, also living in the city of New Orleans, a certain frame house and lot with all its appurtenances, situated on Camp or Prytania street, and known as the third house from Calliope street. Said house stands in my name but I have no interest in the same; it belongs to my said sister, Mary Duncan.

“ M. DUNCAN.”

“ Witness: Edward Duncan.”

The execution of this act was proved before a notary on June 18, 1870, and duly registered. The defendant prays a dissolution of the injunction and for one thousand dollars damages. The court below rendered judgment in favor of defendant, dissolving the injunction with five hundred dollars damages. The plaintiff has appealed.

Several bills of exceptions were taken on the part of the plaintiff. One to the written act signed by the plaintiff, before referred to, recognizing the right of the defendant to the property claimed by her, and to the introduction of parol evidence, going to show sayings and doings of the plaintiff, to establish title in the defendant. To the introduction by defendant of various letters of the plaintiff recognizing the defendant's title to the property, a bill of exceptions was reserved. The written act was clearly admissible, and the letters and parol evidence were properly admitted to show that the plaintiff, for a length of time during the absence of the defendant in Europe, recognized her right to the property she claims, by acting as her agent and collecting and remitting to her moneys collected from time to time for the rent

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of that property, and also to define the property and describe its locality.

The defense is, we think, fully made out. The written instrument, in the nature of a counter letter, not denied by the plaintiff nor in any manner impugned by him, is an effectual bar against the plaintiff's pretensions to ownership of the property. We find no sufficient ground for increasing the damages as prayed for on part of the defendant.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Mr. Justice MORGAN took no part in this decision.

No. 5212.

SUCCESSION OF E. CORDEVOLLE v. JOHN DAWSON. MARIE LOUISE REMY v. The Same. MRS. ELIZABETH MARTIN v. The Same. (Consolidated.)

In 1835, the marriage contract between Mrs. Elizabeth Martin and John Dawson, which, it is claimed, contains a "*constitution of dowry*," was recorded in the book of donations in the office of the recorder of mortgages in New Orleans, and it is contended that this preserved the registry of the wife's mortgage on the property of her husband, and gives her the preference to the proceeds of his property over the other plaintiffs and contestants before this court.

Article 1541, Code of 1825, is invoked. It provides that: "When the donation comprehends property that may be legally mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered within the time prescribed for the registry of mortgages, on a separate book for that purpose, by the register of mortgages, which book shall be open to the inspection of all parties requiring it."

The object of this article is not to give notice of the wife's mortgage upon her husband's property for the protection of her dotal or other rights, but to operate as notice of the property donated, its status, and the inability of the donor, probably, or his creditors, to in any manner affect said property. It relates only to the property embraced in the act of donation, its title and character.

The wife's mortgage, as to her husband's property, existed without the registry, but when the system of this class of mortgages was changed, registry became necessary, and some of the modes prescribed for the registry of the various kinds of mortgages was essential. The registry of the marriage contract, in this instance, not being one of the modes prescribed, is not a compliance with the law on the subject. It did not operate or preserve a mortgage before the first of January, 1870, and there is no law giving it such effect since that date.

Because the function of the mortgage office and its records is to preserve mortgages, it does not follow that the direction to record an act of donation in a book of donations (conceding the marriage contract in this instance to be a donation), created and preserved a mortgage in favor of the donee—the wife. Mortgages, to be preserved and effective, as to third parties, must be registered in the book and in the manner prescribed by the law for that purpose. This was not done in this case.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Charles Louque*, for plaintiff and appellee. *E. H. McCaleb*, for Mrs. E. Martin, wife of John Dawson, appellant.

HOWELL, J. The main question in these cases is one of registry. In 1835 the marriage contract between Mrs. Elizabeth Martin and John

Dawson, which, it is claimed, contains a "constitution of dowry," was recorded in the book of "Donations" in the office of the Recorder of Mortgages in New Orleans, and this, it is contended, preserved the registry of the wife's mortgage on the property of her husband, and gives her the preference to the proceeds of his property over the other plaintiffs and contestants before us.

It is argued in her behalf that her mortgage existed under the Code of 1825 without registry, and that having registered the marriage contract, as already stated, the law as it now exists is complied with. In support of this article 1541, Code of 1825, is invoked. It prescribes that: "When the donation comprehends property that may be legally mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered within the time prescribed for the registry of mortgages, in a separate book kept for that purpose by the register of mortgages, which book shall be open to the inspection of all parties requiring it." The object of this article is not to give notice of the wife's mortgages upon her husband's property for the protection of her dotal or other rights; but as notice of the donation of the property donated, its status and the inability of the donor, probably, or his creditors to in any manner affect said property. It relates solely to the property embraced in the act of donation—its title and character. As said by the wife's counsel, her mortgage existed, as to her husband's property, without the registry; but when the system of this class of mortgages was changed, registry became necessary and some one of the modes prescribed for the registry of the various kinds of mortgages was essential. The registry of the marriage contract, in this instance, not being one of the modes prescribed, is not a compliance with the law on the subject. It did not operate or preserve a mortgage before first January, 1870, and there is no law giving it such effect since that date.

In the case of *Bank of New Orleans v. Toledano & Taylor*, 20 An. 571, we had occasion to express the opinion that a similar registry under the article was intended to give effect to the donation as to third persons. And we do not now think that, because the function of the mortgage office and its records is, as agreed by counsel, to preserve mortgages, therefore the direction to record an act of donation in a book of donations (conceding the marriage contract in this instance to be a donation), created and preserved a mortgage in favor of the donee—the wife. Mortgages, to be preserved and effective as to third persons, must be registered in the book and in the manner specially prescribed by the law for that purpose. Nor do we say that a "re-recording" is necessary since the adoption of the present constitu-

Succession of Cordevielle v. Dawson.

tion, if a valid one was made prior to that date. We do not think the recording of the marriage contract in this case was a compliance with the law relative to the registry of mortgages, so as to affect third persons.

This renders it unnecessary to pass on other questions presented in the two appeals.

Judgment affirmed.

No. 5004.

JAMES M. LEWIS v. FAIRBANKS & GILMAN and D. & J. D. EDWARDS.

Where the indorsers on a promissory note are sued, it is not necessary, when they had filed only a general denial, to prove their signature, the note having been received without objection.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Clarke, Bayne & Renshaw*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

MORGAN, J. The note sued on is in the following words:

“\$2207 44.

NEW ORLEANS, October 18, 1873.

“Thirty days after date we promise to pay to the order of Daniel & J. D. Edwards twenty-two hundred and seven dollars and forty-four cents, value received, with interest at the rate of eight per cent. per annum from maturity till paid.

(Signed)

“FAIRBANKS & GILMAN.”

Indorsed: Daniel & James D. Edwards.

All the parties to the note were sued, and judgment asked against them *in solido*. Daniel & James D. Edwards pleaded the general issue. On the trial the note sued on was offered in evidence and received without objection. Judgment was rendered as prayed for. D. & J. D. Edwards appeal. The error assigned is that the indorsement of the Edwards was not proved. Their answer being a general denial, and the note having been offered in evidence and received without objection, it was not necessary to prove their signature. The case of *Blum v. Sallis*, 24 An. 118, relied on by appellants, does not apply. There the attempt was to confirm a judgment by default, plaintiff claiming title to the note by reason of the indorsement thereon. The suit was not against the indorser. The indorsement was plaintiffs' title. It was under this state of facts that the court held that the case should be remanded in order to prove the indorsement. Here it is the indorsers who are sued, and we repeat it was not necessary, when they had filed only a general denial, to prove their signature, the note having been received without objection. The appeal was intended for delay.

Judgment affirmed, with ten per cent. damages for a frivolous appeal.

State of Louisiana ex rel. Weber v. Fisher.

No. 5200.

STATE OF LOUISIANA, ex rel. D. A. WEBER, v. C. L. FISHER.

The authority of the Governor to remove a tax collector and appoint a successor, has been expressly recognized by this court in the cases of Dougherty and of Dayrus, 25 An. No reasons can be seen for reversing these decisions.

A PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J.* Jury trial. *Farrar & Montgomery, Olivier O. Provosty*, district attorney, for relator and appellant. *Wickliffe & Powell*, for defendant and appellee.

WYLY, J. This is a controversy, under the intrusion law, for the office of tax collector for the parish of West Feliciana. The defendant was tax collector during the year 1873, and he held the office until February, 1874, when he was removed by the Governor and the relator appointed in his place. The authority of the Governor to remove a tax collector and appoint a successor, has been expressly recognized by this court in the cases of Dougherty and Dayrus, 25 An.

While those decisions stand, and we see no reason to reverse them, the defense set up in this case can not be maintained.

It is therefore ordered that the judgment herein in favor of the defendant be annulled, and it is now ordered that there be judgment in favor of the plaintiff, decreeing the defendant to be unlawfully holding the office of tax collector and restraining him from further proceeding therein, and also recognizing D. A. Weber as the lawful tax collector, entitled to the office and all the papers, documents and appurtenances thereto belonging. It is further ordered that the defendant pay costs of both courts.

No. 3407.

M. H. MEYER v. A. FREDERICK.

The defendant removed to the city of New Orleans a certain sawmill, engine and other fixtures, from mortgaged premises on which they stood. For which removal he is sued in damages by the plaintiff, who claims that he holds on the tract of land to which they were attached a vendor's privilege and special mortgage. The removal was effected under the written authority of one of the owners of the property. Some time afterwards, said sawmill, engine and fixtures were purchased by the defendant, who had removed them in the manner above stated.

At the time of the sale to defendant, said objects were movable property and in no way affected by the mortgage.

The fact that defendant was employed by the owner to remove the property, created no legal obligation against him in favor of the mortgage creditor, nor did his purchase of it subsequently have that effect.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. M. Grivot*, for plaintiff and appellant. *C. E. Schmidt & Seegers*, for defendant and appellee.

WYLY, J. The plaintiff sues for \$2115 damages, on the ground that

Meyer v. Frederick.

he sustained loss to that amount by the illegal act of the defendant in tearing down a sawmill and moving off and selling it with the engine, fixtures etc., from a tract of land to which they were attached and upon which he held a vendor's privilege and special mortgage; that without the sawmill the land is valueless, and that the damage sustained is equal to the amount of the mortgage. The court rejected the demand and the plaintiff appeals.

The defendant removed the sawmill and fixtures from the mortgaged premises to this city under a written authority from George Warner, one of the owners of the property. When he bought it from Warner, some time afterwards, it was movable property, and in no manner affected by the mortgage. The fact that he was employed by the owner to remove the property created no legal obligation against him in favor of the mortgage creditor; nor did his purchase of it subsequently have that effect.

Judgment affirmed.

26 538
110 477

No. 3465.

STATE OF LOUISIANA v. JOHN C. BLOHM et als.

This is an action against an auctioneer and his surety on his bond for duties on sales.

The surety should hardly be heard to make such a defense as the one set up in this case— which is, that the bond was not legal at the time of the defalcation alleged against the principal, because said principal had not taken out the license and the oath required by law.

Considering that the principal is proved to have acted as auctioneer and made repeated settlements under oath, as required by law, with the Auditor, showing the amount claimed to be due the State, it is to be presumed, as against the surety, that he complied in other respects with the law.

The prescription of one and two years, based on the act of 1869, p. 45, second section, does not apply. This statute is not understood to release sureties from any liability existing at the date of its passage.

APPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. Hornor & Benedict*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

HOWELL, J. The State sued Blohm, as auctioneer, for duties on sales made by him, and joined the sureties on his bond. Judgment was rendered for the State, and Oberheuser, one of the sureties, appealed.

His defense is, first, that the bond is not legal, because at the date of the defalcation he had not taken out the license, nor taken the oath required by law. This is a defense which the surety should hardly be heard to make as to his principal. But as the principal is shown to have acted as auctioneer and made regular settlements under oath, as required by law, with the Auditor, showing the amount claimed to be due the State, we will presume, as against the surety, that he complied in other respects with the law.

State of Louisiana v. Blohm et al.

The next defense is the prescription of one and two years, based on the act of 1869, p. 45, the second section of which provides: "That within twenty days after the passage of this act, in the parish of Orleans, * * * all auctioneers' bonds at present in force shall be deemed to expire, and the sureties thereon shall not be liable on any such bond for any act of the principal on said bond, after the date of their expiration, as provided by this act."

The act which fixed the liability of the defendants in this case was committed in 1868, and we understand the last clause of the above statute to refer to the acts of the principals occurring after the date fixed for the expiration of the bonds, and not to release sureties from liability existing at the date of the passage of the statute. The principal on this bond was indebted to the State at the date of the above statute, and its language does not convey the idea that the surety on his bond was thereby released.

Judgment affirmed.

No. 4818.

SUCCESSION OF TOBIAS DRUM. On opposition of C. F. BERENS.

The judge *a quo* erred in allowing the widow, testamentary executrix in this succession, the homestead of \$1000 in addition to two sums: \$215, value of furniture, and \$140, rent, received by her. Whether the furniture belonged to the widow or not, its value, according to the law, must be deducted from the homestead allowance. The rent also should have been deducted.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. E. Bermudez*, for appellant. *Cotton & Levy*, for appellee.

HOWELL, J. The widow and testamentary executrix of the deceased, filed an account of her administration, to which these parties made opposition. Judgment was rendered dismissing the oppositions of two of the opponents, sustaining that of the third, in part, by striking out some items on the account and reducing others, from which the said opponent C. F. Berens appealed.

The first point made by him is, that the judge *a quo* erred in allowing the widow the homestead of \$1000 in addition to two sums: \$215, value of furniture, and \$140 rent, received by her. His position is correct. Whether the furniture belonged to the widow or not, its value, according to the law, must be deducted from the homestead allowance. The rent also should have been deducted.

The other points made by him are not sustained by the law and evidence.

It is therefore ordered, that the judgment appealed from be amended by deducting from the homestead allowance of \$1000, the sum of \$355, consisting of \$215, value of furniture, and \$140 rent, received by the widow, and as thus amended, the judgment be affirmed. Costs to be paid by the succession.

Huppenbauer v. Durlin.

No. 3316.

FRITZ HUPPENBAUER v. LOUIS DURLIN.

When a reconventional demand has been filed, the plaintiff is bound to take notice of its trial and of all adverse defenses set up in the cause which he himself has commenced against his adversary.

In this case a jury was prayed for by defendant. The case was tried without a jury. No bill of exceptions was taken by plaintiff to the trial, and no opposition to the trial without a jury was made by either party. Under such circumstances, this court will presume that a trial by jury was waived.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Wenck & Hufft*, for plaintiff and appellant. *W. H. Rogers, Samuel P. Blanc*, for defendant and appellee.

TALIAFERRO, J. The plaintiff brings this action to annul a contract of lease entered into between himself and the defendant in November 1866. The case was commenced in the District Court of the Parish of Jefferson. After a protracted delay and a loss of a part of the record, it was at length transferred to and reinstated in the Sixth District Court. The answer is a general denial, and the defendant sets up a reconventional demand against the plaintiff of five thousand dollars.

The judgment of the lower court dismissed the plaintiff's claim and awarded judgment in favor of the defendant on his reconventional demand for \$2036, with interest, from which the plaintiff appealed. The appeal was devolutive and an execution issued. The plaintiff thereupon enjoined the sale of his property seized under the execution, and prayed that the judgment upon which it issued be declared null and void. After the appeal was taken, it was set aside on rule in the lower court on the ground of the insufficiency of the surety on the appeal bond. In this court, on motion, the appeal was dismissed on the same ground. 23 An. p. 739. The defendant pleads *res judicata*, and offers in this court the record of the injunction suit, No. 3336, to show that in that case as in the one at bar the same grounds of defense are relied upon and that the plaintiff was pursuing two modes of revision at the same time, one by appeal and the other by action of nullity. The plaintiff objects that this record can not be received in evidence in this court as it makes no part of the record in the case now before this court on appeal. It is not necessary to pass upon this objection as it appears that the plaintiff relies mainly upon the ground that the case was tried in the court below, without the proper notice to him of the trial, and that the trial took place without a jury which had been prayed for and allowed by the court. The facts seem to be that the plaintiff himself had caused the case to be transferred to the Sixth District Court. He was in that court at his own instance. It appears that the case was fixed for trial by the clerk and called up for trial on the seventeenth of November, 1870. The plaintiff is presumed to have

Huppenbauer v. Durlin.

been in court by himself or counsel and to have had notice of the proceedings in the case. 1 Rob. 275; 10 An. 766. When a reconventional demand has been filed, plaintiff is bound to take notice of its trial and of all adverse defenses set up in the cause which he himself has commenced against his adversary. 13 An. 395. In this case a jury was prayed for by the defendant. The case was tried without a jury. No bill of exceptions was taken by the plaintiff to the trial and no opposition to the trial without a jury was made by either party. In such a case this court will presume that a trial by jury was waived. 8 An. 376.

We think the judgment of the lower court has not done injustice to the plaintiff.

The defendant asks an amendment of the judgment by increasing it to the sum of five thousand dollars, but this we are not satisfied he is entitled to.

It is therefore, ordered and decreed that the judgment of the District Court be affirmed with costs.

No. 4897.

MRS. A. E. DEBLANC v. F. LEVASSEUR et al.

Judgment having been rendered against both defendants in this suit by an heir against her tutor, who was also administrator, and his surety on the two bonds, the surety alone appealed. The tutor and administrator being an appellee, the prayer of the plaintiff, the other appellee, to amend the judgment against him, can not be entertained.

The question, raised on the merits, that the plaintiff, being a married woman, was not authorized by her husband to bring this suit, must be considered as settled between the parties by the decision on the motion to dismiss the appeal, which was made on the ground of want of proper parties—the husband not having been joined in the petition of appeal. The suit having been commenced by the wife, assisted by her husband, citation of appeal to her was sufficient.

The judgment referred to as an estoppel against plaintiff's action, did not impose upon her the condition to claim certain pieces of property in kind, to which she might be entitled, but reserved her right to the proceeds in case she failed to recover said property. She has alleged and shown that the title of the purchasers was maintained in several suits she instituted. She therefore can exercise her second right.

The objection that the security can not be sued for the proceeds, no step having been previously taken to fix the liability of the principal, is not well founded.

This objection was not made in the lower court, but the surety adopted and joined in the defense made by the principal, and, on trial, the plaintiff showed by the returns of *nulla bona* on one or two *fiari facias* for small sums, that further process against the principal would be unavailing.

The tutor states that he obtained the individual consent of persons who had composed a family meeting on a previous occasion, to make use of the capital of the minor's estate as he did. This is not justifiable, and, according to our law and jurisprudence, can not be allowed in favor of a tutor and surety.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J. Charles Louque, M. E. Livaudais*, for plaintiff and appellee. *E. Cambray, Alphonse Canonge*, for defendant and appellant.

ON MOTION TO DISMISS.

MORGAN, J. This action was instituted by a married woman, assisted

and authorized by her husband. From the judgment rendered against them, the defendants appealed by petition. Mrs. Deblanc alone is cited.

The motion is now made to dismiss the appeal on the ground of want of proper parties—the husband not having been joined in the petition of appeal. The suit having been commenced by the wife, assisted by her husband, citation of appeal to her was sufficient.

The motion to dismiss is therefore denied.

ON THE MERITS.

HOWELL, J. This is a suit by an heir against her tutor, who was also administrator, and his surety on the two bonds.

On an opposition to an account in the lower court, the plaintiff obtained a judgment against the administrator for \$462 22 and interest, with a reservation of her right to claim from him the proceeds of certain properties sold by him, in case she failed to recover the said properties in kind from the several purchasers. She instituted suits against those parties, and the title of one of them having been maintained, she abandoned those actions and instituted this for the proceeds. Judgment having been rendered against both defendants, the surety, Levasseur, alone appealed. The tutor and administrator being an appellee, the prayer of the plaintiff, the other appellee, to amend the judgment as to him, can not be entertained.

First—The first point made by the appellant, the surety, is that the plaintiff, a married woman, was not authorized by her husband to bring this suit.

This question we must consider as settled between these parties by the motion to dismiss his appeal, which was decided in his favor.

Second—The plaintiff is estopped from prosecuting this suit against P. O. Peyroux, the tutor and administrator not having yet fulfilled the conditions imposed upon her by a former judgment to claim in kind the properties.

The judgment referred to did not impose on her the condition to claim the properties, but reserved her right to the proceeds in case she failed to recover the property. She alleged and has shown that the title of the purchasers was maintained. She therefore can exercise her reserved right.

Third—The security can not yet be sued for the proceeds of the sales, no step having been previously taken to fix the liability of the principal.

This objection was not made in the lower court, but the surety adopted and joined in the defense made by the principal, and on the trial the plaintiff showed by the returns of *nulla bona* on one or two

 Mrs. A. E. Deblanc v. Levasseur et al.

feri facias for small sums that further process against the principal will be unavailing.

Fourth—Further credits should be allowed the surety.

The judge *a quo* allowed credits for the proceeds of a certain property relinquished by the plaintiff, and of two pieces for which she compromised with the respective purchasers, taking from each a specific sum. In this there was no error. He also allowed the appellant a deduction of \$833 13, being the plaintiff's proportion of a sum expended by the tutor for the minors under his charge. Of this she complained, and says that if he made such expenditure it was taken from the capital, and was not authorized. In this she is correct.

The tutor states that he obtained the individual consent of persons, who had composed a family meeting on a previous occasion, to make use of the capital of the minors' estate as he did. This is not justifiable, and, according to our law and jurisprudence, can not be allowed in favor of a tutor and surety. This item of \$833 13 was improperly allowed.

The judge seems to have overlooked a credit for \$21 10 given by plaintiff in her petition.

The amount for which the surety is shown to be liable is made up as follows:

Amount of judgment on opposition.....	\$462 22
One-seventh of proceeds of sale, \$13,685 41.....	1,955 06
	<hr/>
CREDIT.	\$2,417 28
Amount admitted in petition.....	\$21 10
One-seventh of proceeds of property as compromised by plaintiff, \$4880 02.....	697 14— \$718 24
	<hr/>
	\$1,699 04

It is therefore ordered that the judgment appealed from be amended by increasing the amount thereof, as to defendant F. Lavasseur, from \$1371 91 to \$1699 04 against said Levasseur, as thus amended it be affirmed with costs.

Rehearing refused.

 No. 5122.

STATE OF LOUISIANA v. SAM JOHNSON.

The continuance of a cause comes within the sound legal discretion of the judge, and the facts upon which he proceeds in the exercise of that discretion do not come within the review of this court.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J.* Criminal case. *Olivier Provosty*, District Attorney, for the State, appellee. *E. Phillips*, for defendant and appellant.

 State of Louisiana v. Johnson.

TALIAFERRO, J. The defendant, convicted of the crime of murder, appeals from a judgment sentencing him to hard labor in the penitentiary for life, in conformity with the verdict of a jury. The case is presented by two bills of exceptions. Each of these was taken to the ruling of the court refusing the defendant's applications for a continuance of the case. The continuance of a cause comes within the sound legal discretion of the judge, and the facts upon which he proceeds in the exercise of that discretion do not come under the review of this court. It is therefore ordered that the judgment appealed from be affirmed.

 No. 4739.

HIGGINS & MAURER v. J. C. WILNER.

 26 544
 50 383

The thing leased being destroyed in part by fire, the defendant had the right, under article 2697 of the Revised Code, either to demand a diminution of the price, or a revocation of the lease. He preferred the latter. In according to the defendant the exercise of a plain legal right, the court below committed no error.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Cotton & Levy*, for plaintiffs and appellants. *Lacey & Butler*, for defendant and appellee.

WYLY, J. On the seventeenth August, 1871, the plaintiffs leased to the defendant a cotton pickery, on Tchoupitoulas street, for twelve months, at one hundred and twenty-five dollars per month, evidenced by notes of the defendant. On the seventeenth April, 1872, the leased premises were in part destroyed by fire, and on the twenty-fourth day of the same month the defendant notified the plaintiffs of the fire, and after tendering eighty-three dollars and sixty-three cents, the balance of rent due at that date, demanded a revocation of the lease and the return of the notes.

This proposition was refused and the plaintiffs brought this suit to collect the rent. The defendant set up his demand for the annulment of the lease, and prayed in reconvention that plaintiffs be required to return to him the five outstanding rent notes. There was judgment for the defendant and the plaintiffs appeal.

We see no error in the judgment. The thing leased was destroyed in part by fire, and the defendant had the right, under article 2697, of the Revised Code, either to demand a diminution of the price or a revocation of the lease. He preferred the latter. In according the defendant the exercise of a plain legal right, the court below committed no error. *Penn v. Kearny*, 21 An. 21.

Judgment affirmed.

Fleming & Baldwin v. Scott and Ida Watson.

No. 5084.

FLEMING & BALDWIN v. SCOTT and IDA WATSON. MATILDA J. BOWIE
et als. v. The same. (Consolidated.)

26	545
44	840
26	545
d112	164
114	823
26	545
116	955

It is objected that parol evidence should not have been received to prove the actual boundaries of Hollywood plantation, because, in the old records of the parish, in which Hollywood is referred to, the lands constituting that place are described, and to receive parol evidence to vary or contradict these records is prohibited. This is an error. The boundaries or limits of Hollywood might be changed at will by its owner, if he also owned the adjoining tracts of land, and the evidence received was to show that the boundaries of Hollywood plantation, as well known in 1868, 1869, were different from what they had been eighteen or twenty years before.

The act of sale shows that the Hollywood plantation was sold as a separate and distinct thing, as a field inclosed, with known and well defined limits, and the evidence was to establish said limits. That is certain, which can be made certain.

It is also objected that a partition of real estate can not be established by parol, and therefore, that testimony to show that the field had been actually divided and taken into the possession of the heirs, should not have been received. No valid force can be given to this objection.

There is written proof, by authentic acts, that the partition had been made. The testimony was to prove the fact of the actual division of the field and of the possession by one of the parties of his third share under said partition. The evidence was properly received.

It was further objected that parol evidence should not have been received to prove an error in the description of the lands sold to Fleming & Baldwin. If that be true, it would be unfortunate indeed, for there could hardly be any other mode to prove a wrong description.

This is not an attempt to prove, by parol, a sale of immovable property, nor to contradict a valid existing instrument, but to show that, by accident or negligence, the instrument in question has not been made the actual depository of the intention of the contracting parties. *Ex necessitate rei*, parol evidence should be received.

It is on this ground that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindred to those of fraud, and should be governed by the same rules. Is it not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to the contract?

The evidence shows that there was an error in the description of the property in the deed to Fleming & Baldwin to the extent that it conflicts with Hollywood plantation. The other plaintiffs are concluded by their own renunciation and ratification on record, and which they can not now oppose.

A PPEAL from the Thirteenth Judicial District Court, parish of Texas. *Hough, J. T. P. Farrar, W. B. Spencer, A. N. Ogden*, for plaintiffs and appellees. *J. Aroni and T. P. Clinton*, for defendants and appellants.

LUDELING, C. J. This litigation was commenced by Fleming & Baldwin suing for a partition of a part of the Hollywood plantation. Matilda J. Bowie et als. also filed a suit against defendants and prayed for a partition and for the fixing of the boundaries between their estates. Fleming & Baldwin then intervened in said suit and joined in the prayer of petitioners. The object of these suits is to fix the boundaries of the lands belonging to the parties to the suits.

The facts, which give rise to the controversy, are as follows: Fleming & Baldwin, transferees of an obligation made by John Ruth and wife, in favor of the Bank of Louisiana, instituted suit thereon against the heirs of Ruth and obtained judgment against them. To secure

State of Louisiana v. Johnson.

TALIAFERRO, J. The defendant, convicted of the crime of murder, appeals from a judgment sentencing him to hard labor in the penitentiary for life, in conformity with the verdict of a jury. The case is presented by two bills of exceptions. Each of these was taken to the ruling of the court refusing the defendant's applications for a continuance of the case. The continuance of a cause comes within the sound legal discretion of the judge, and the facts upon which he proceeds in the exercise of that discretion do not come under the review of this court. It is therefore ordered that the judgment appealed from be affirmed.

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This proposition was refused and the plaintiffs brought this suit to collect the rent. The defendant set up his demand for the annulment of the lease, and prayed in reconvention that plaintiffs be required to return to him the five outstanding rent notes. There was judgment for the defendant and the plaintiffs appeal.

We see no error in the judgment. The thing leased was destroyed in part by fire, and the defendant had the right, under article 2697, of the Revised Code, either to demand a diminution of the price or a revocation of the lease. He preferred the latter. In according the defendant the exercise of a plain legal right, the court below committed no error. *Penn v. Kearny*, 21 An. 21.

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The act of sale shows that the Hollywood plantation was sold as a separate and distinct thing, as a field inclosed, with known and well defined limits, and the evidence was to establish said limits. That is certain, which can be made certain.

It is also objected that a partition of real estate can not be established by parol, and therefore, that testimony to show that the field had been actually divided and taken into the possession of the heirs, should not have been received. No valid force can be given to this objection.

There is written proof, by authentic acts, that the partition had been made. The testimony was to prove the fact of the actual division of the field and of the possession by one of the parties of his third share under said partition. The evidence was properly received.

It was further objected that parol evidence should not have been received to prove an error in the description of the lands sold to Fleming & Baldwin. If that be true, it would be unfortunate indeed, for there could hardly be any other mode to prove a wrong description.

This is not an attempt to prove, by parol, a sale of immovable property, nor to contradict a valid existing instrument, but to show that, by accident or negligence, the instrument in question has not been made the actual depository of the intention of the contracting parties. *Ex necessitate rei*, parol evidence should be received.

It is on this ground that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindred to those of fraud, and should be governed by the same rules. Is it not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to the contract?

The evidence shows that there was an error in the description of the property in the deed to Fleming & Baldwin to the extent that it conflicts with Hollywood plantation. The other plaintiffs are concluded by their own renunciation and ratification on record, and which they can not now oppose.

A PPEAL from the Thirteenth Judicial District Court, parish of Texas. *Hough, J. T. P. Farrar, W. B. Spencer, A. N. Ogden*, for plaintiffs and appellees. *J. Aroni and T. P. Clinton*, for defendants and appellants.

LUDELING, C. J. This litigation was commenced by Fleming & Baldwin suing for a partition of a part of the Hollywood plantation. Matilda J. Bowie et als. also filed a suit against defendants and prayed for a partition and for the fixing of the boundaries between their estates. Fleming & Baldwin then intervened in said suit and joined in the prayer of petitioners. The object of these suits is to fix the boundaries of the lands belonging to the parties to the suits.

The facts, which give rise to the controversy, are as follows: Fleming & Baldwin, transferees of an obligation made by John Ruth and wife, in favor of the Bank of Louisiana, instituted suit thereon against the heirs of Ruth and obtained judgment against them. To secure

Fleming & Baldwin v. Scott and Ida Watson.

said debt a mortgage existed on the Locustland plantation, and also on a part of what is now Hollywood plantation. From this judgment the heirs of Ruth appealed, and pending the appeal the parties compromised their differences. Fleming & Baldwin agreed to buy the Locustland plantation for \$32,850, fifteen thousand dollars cash and the balance to be credited on their judgment against the heirs in full satisfaction thereof. And the heirs of Ruth, being of age, consented to the sale and settlement of said judgment.

Scott and Ida Watson had a judgment against John K. Ruth, one of the heirs of John and Ann S. Ruth, with a judicial mortgage upon the interest of said John K. Ruth in all the lands of said succession. They also compromised with him by taking from him the "northwestern third" of Hollywood plantation, which said John K. Ruth was then in possession of under a partition, made between the heirs of Ruth, all of age, on the first of January, 1868, long anterior to the sale to Fleming & Baldwin.

The sale to Scott and Ida Watson was made on the twenty-ninth of October, 1869, and the sale to Fleming & Baldwin was made on the first of November, 1869. Both deeds were passed before the same recorder in the parish of Tensas, and thus were recorded on the second of November, 1869.

During many years before the partition and sales above mentioned were made, John Ruth was the owner of several plantations, three of which were the Cypress Grove, Hollywood and Locustland plantations. The latter two are the subjects of this litigation. The first is mentioned only because it forms the boundary of the Hollywood plantation on one side. After Mr. Ruth had acquired these estates it seems he changed the boundaries of the Locustland and Hollywood plantations. The Hollywood plantation was the "home place" of Mr. Ruth, and from the evidence in the record it appears that for nearly a fifth of a century it had fixed and well defined boundaries. This plantation was separated from the Cypress Grove at first by a fence, afterwards by a levee, upon which a hedge was planted; from the Locustland it was separated by the Hempfield lane. The places were worked and managed by different laborers and managers as distinct plantations. The Hollywood plantation contained 9000 acres of land, 1800 acres whereof were cultivated. What constituted Hollywood plantation was well known in the community, and its boundaries and limits were established, beyond controversy, by a number of witnesses. It was this estate, the Hollywood plantation, which was partitioned in January, 1869, among the heirs of Ruth, and of which John K. Ruth received the "northwestern third," "being that part thereof fronting on Lake St. Joseph and adjoining Cypress Grove plantation," etc.

Fleming & Baldwin v. Scott and Ida Watson.

The testimony shows that the heirs went into possession of their portions of the lands; that John K. Ruth took actual possession of the third of the cleared land, "being that part fronting on Lake St. Joseph and adjoining Cypress Grove plantation," with the assent of all the heirs, and that he sold and delivered the same to Scott and Ida Watson, as already stated; that his said vendees had been in the quiet possession thereof a considerable time before any pretensions were set up against them by the plaintiffs. It further appears that, before the purchase of Fleming & Baldwin, they were informed that the Locust-land plantation only contained about seven hundred acres of cleared land, and that when they bought they must have believed that was the quantity of cleared land they were buying; that they took possession of that quantity and set up no pretension or claim to any part of Hollywood until nearly two years after their purchase. These contemporaneous acts of the parties show how they interpreted the partition and acts of sale between themselves.

It is objected that parol evidence should not have been received to prove the actual boundaries of Hollywood plantation, because, on the old records of the parish, in which Hollywood is referred to, the lands constituting that place are described, and to receive parol evidence to vary or contradict those records is prohibited. This is an error. The boundaries or limits of Hollywood might be changed at will by its owner, if he also owned the adjoining tracts of land; and the evidence received was to show that the boundaries of Hollywood plantation as well known in 1868 and 1869, were different from what they had been eighteen or twenty years before. The act of sale shows that the Hollywood plantation was sold as a separate and distinct thing, as a field inclosed, with known and well defined limits, and the evidence was to establish said limits. That is certain, which can be made certain.

It was also objected that a partition of real estate can not be established by parol, and, therefore, that testimony to show that the field had been actually divided and taken into the possession of the heirs, should not have been received. There is written proof that the partition had been made. John K. Ruth, in his act of sale to Scott and Ida Watson, so declares, and the renunciation of his co-heirs of their rights to the said third of Hollywood, and their ratification of said sale to Scott and Ida Watson, declares and recognizes the said partition. The testimony was to prove the fact of the actual division of the field and of the possession of John K. Ruth of his third, under said partition. We think the evidence was properly received. It was further objected that parol evidence should not have been received to prove an error in the description of the lands sold to Fleming & Baldwin. If that be true, it would be unfortunate indeed, for there could hardly be any other mode to prove a wrong description.

Fleming & Baldwin v. Scott and Ida Watson.

"This is not an attempt to prove, by parol, a sale of immovable property, nor to contradict a valid existing instrument, but to show that by accident or negligence the instrument in question has not been made the actual depository of the intention and meaning of the contracting parties." *Ex necessitate rei*, parol evidence should be received. It is on this ground that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindred to those of fraud and should be governed by the same rules. Is it not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to the contract? 2 La. 3; 4 An. 441; 9 An. 29; 15 La. 311; 4 Starkie Ev. 10 and 18.

The evidence shows that there was an error in the description of the property in the deed to Fleming & Baldwin to the extent that it conflicts with Hollywood plantation. The other plaintiffs are concluded by their renunciation and ratification made in the deed of sale from John K. Ruth to Scott and Ida Watson.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the defendants, rejecting the plaintiffs' and intervenors' demands, with costs in both courts. It is further ordered that defendants be quieted and maintained in their possession of the northwestern third part of the Hollywood plantation.

WYLY, J., *dissenting*. I dissent in this case, and reserve the right to file my reasons hereafter.

Rehearing refused.

No. 5290.

STATE ex rel. L. B. CLAIBORNE v. CHARLES PARLANGE.

The relator, in this case, was duly elected or appointed to the office he claims on the second of December, 1872, in the only manner then known to the law. The act of the Legislature of March 9, 1874, changing the mode of appointment can not be construed so as to make it retroactive. It must be understood to apply to parishes where appointments to that office had not been made by the police juries, or where vacancies existed.

In this instance the office of district attorney *pro tempore* had been filled and the incumbent's term of office had not expired. The act of March 9, 1874, does not abolish the office of district attorney *pro tempore*, but only alters the mode of appointing to that office.

APPEAL from the Seventh Judicial District Court, parish of Point A Coupee. *Hewes, J. T. O. Provosty*, District Attorney. *Yoist & Haralson, Barrow & Pope* and *A. Voorhies*, for relator and appellant. *Ed. Phillips* and *Charles Parlange, in propria persona*, defendant and appellee.

TALIAFERRO, J. This action is brought under the intrusion law. The relator alleges that he was duly elected and appointed by the

State ex rel. Claiborne v. Parlange.

police jury of the parish of Point Coupee on the second day of December, 1872, district attorney *pro tempore* for the said parish of Point Coupee. He complains that the defendant has intruded into and usurps said office, and claims the right to perform the duties and receive the salary and emoluments of said office to the annoyance and injury of the relator. He prays judgment recognizing him as the legal district attorney *pro tempore* of said parish, and that defendant be enjoined from exercising any of the functions, or discharging any of the duties of the said office. The defendant filed a peremptory exception to the relator's right to stand in judgment, and denies that he has any interest whatever in the subject matter, and that relator shows any cause of action.

There was judgment in favor of the defendant and the plaintiff has appealed. By his exception the defendant admits the allegations of the petition; but he rests his defense upon the act of the Legislature of the ninth of March, 1874, which repeals those sections of the Revised Statutes providing for the appointment of district attorneys *pro tempore* for the parishes by the police juries, and provides for the appointment of those officers by the Governor. The defendant urges that by the enactment of that law the relator became *functus officio*. But the relator argues that the act of 1874 does not repeal the act of 1868, establishing the office of district attorney *pro tempore*, and having been appointed under that act by the police jury, as directed by law, his tenure of office is not affected by the change made in the manner of appointing. The relator further contends that the act of ninth of March, 1874, is void according to article 114 of the State constitution, as it does not declare its object in the title.

We think the position assumed by the relator that the change made in the manner of appointing district attorneys *pro tempore* for the parishes does not affect appointments previously made in the manner directed by law. The relator was duly elected or appointed to the office he claims on the second of December, 1872, in the only manner then known to the law. The act of the Legislature of ninth March, 1874, changing the mode of appointment can not be construed so as to make it retroactive. It provides, "that immediately after the passage of this act there shall be appointed a district attorney *pro tempore*, etc., by the Governor with the advice and consent of the Senate," etc. But this act must be understood to apply to parishes where appointments to that office had not been made by the police juries, or where vacancies existed.

In this case the office of district attorney *pro tempore* had been filled and the incumbent's term of office has not expired. The act of March 9, 1874, does not abolish the office of district attorney *pro tempore*, but

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only alters the mode of appointing to that office. See case of *State v. Kreider*, 21 An. 482, and the case of the Returning Board and other cases subsequently decided. We think the judgment erroneous.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the relator and against the defendant; that the relator, L. B. Claiborne, be and he is hereby recognized as the district attorney *pro tempore* for the parish of Point Coupee, entitled to hold and discharge the duties and to receive the profits and emoluments by law appertaining to the same. It is further ordered that the claims set up to said office by the defendant be rejected, the defendant and appellee paying costs in both courts.

No. 5219.

STATE ex rel. VAN NORDEN v. THE JUDGE OF THE SUPERIOR DISTRICT COURT.

On the trial of a rule, contradictorily with the parties in interest, to show cause why a writ of injunction should not be granted to restrain a sale as prayed for by relator, the judge *a quo* rendered an interlocutory order refusing the injunction and declined to grant an appeal from said order. In this the judge erred.

The order complained of was certainly an interlocutory order working the relator an irreparable injury. His property was about to be sold for the debt of another; he was entitled to an injunction to protect his right of property, having made affidavit and tendered bond according to law. These sworn averments must be taken as true for the purposes of this inquiry. The relator has the right to have the judgment revised. Upon examining the evidence this court may find that the judge erred, and that an injunction should issue.

The right of appeal is a constitutional right, and it should be jealously guarded by this court.

APPPLICATION for a writ of mandamus directed to *J. Hawkins*, Judge of the Superior District Court, parish of Orleans. *Lacey & Butler, Rice & Whitaker, William H. Hunt*, for relator. Respondent, *in propria persona*.

WYLY, J. The State having seized, under its judgment against the Mississippi and Mexican Gulf Ship Canal Company, certain property, the relator filed a third opposition on the ground that he is the owner thereof, and making the affidavit and tendering bond according to law, he prayed for a writ of injunction to restrain the sale. The court granted a rule to show cause, and at the trial thereof, contradictorily with the parties in interest, rendered an interlocutory order refusing the injunction. The relator sought to appeal but the court refused him this right, whereupon he instituted this mandamus proceeding.

The order complained of was certainly an interlocutory order working the relator an irreparable injury. His property was about to be

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sold for the debt of another. He was entitled to an injunction to protect his right of property, having made affidavit and tendered bond according to law. These sworn averments must be taken as true for the purposes of this inquiry.

It is contended, however, that after hearing the parties the judge has decided the relator is not entitled to the writ. That judgment the relator has the right to have revised. Upon examining the evidence we may find that the judge erred and that an injunction should issue. The right of appeal is a constitutional right and it should be jealously guarded by the court.

It is therefore ordered that the mandamus herein be made peremptory.

No. 4831.

CAROLINE RICHARDSON, Wife of A. PISEROS v. E. R. CHEVALLEY et als.

The surety on the injunction bond being condemned to pay no damages, has manifestly no interest in the appeal which the plaintiff has taken, the court *a quo* having dismissed the suit on the exception of no cause of action, and the injunction being dissolved without damages, reserving to defendant the right to claim the same on a separate action on the bond.

The decision of this court in this appeal can in no manner affect the surety on the injunction bond, wherefore it would be a vain thing to make him a party to the appeal.

It appears from the record that the property claimed by plaintiff was seized and sold at the suit of Marie Jeanne Piseros and bought by Chevalley, one of the defendants. It was originally purchased in the name of plaintiff, but this was done during her marriage, as her husband appears as a party to the act authorizing the purchase. The property so purchased must, in the absence of anything being shown to the contrary, be considered community property, and liable for the community debts.

It is moreover shown that the wife was a party to an act of mortgage by her husband of this same property in favor of Marie Jeanne Piseros, to secure the payment of the purchase price of the same, and fully renounced her rights on the property.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. R. King Cutler, A. J. Steele*, for plaintiff and appellee. *B. Howard McCaleb, Octave Morel*, for defendants and appellees.

ON MOTION TO DISMISS.

WYLY, J. The plaintiff sued to set aside the adjudication to the defendant E. R. Chevalley of the property described in the petition, and to be decreed the owner thereof. She also enjoined the defendants from dispossessing her of said property. On the exception that the petition discloses no cause of action, the court dismissed the suit and dissolved the injunction without damages, reserving to the defendant in a separate action the right to claim damages on the injunction bond. From this judgment the plaintiff appeals.

The defendants now move to dismiss the appeal, because the surety on the injunction bond is not made party thereto, the fault being im-

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putable to the plaintiff who only prayed in his petition for appeal that the defendants be cited. In support of this motion they cite the cases of *Pecoul v. Perret*, 20 An. 70, and *Avegno v. Johnston*, 22 An. 400.

The case at bar is different from those cited. Here the suit was dismissed on the exception of no cause of action, and the injunction dissolved, reserving to the defendant the right to claim damages in a separate action on the bond.

The surety condemned to pay no damages, has manifestly no interest in the appeal which the plaintiff has taken with a view to have the judgment reversed which dismissed her suit. The decision of this court in this appeal can in no manner affect the surety on the injunction bond. Therefore it would be a vain thing to make him a party to the appeal.

The motion to dismiss is therefore denied.

ON THE MERITS.

TALIAFERRO, J. The plaintiff enjoins the defendant from taking possession of certain lots of ground seized and sold under execution issued on a judgment rendered against her husband in favor of Marie Jeanne Piseros. She alleges that the property seized belongs to her as her separate paraphernal estate; that the said property was under execution by the sheriff without notice to her, and the first knowledge she had of its having been sold was a notice served upon her by the defendant Chevalley to vacate the premises as he had purchased the property at the sheriff's sale. She prays citations to the parties in interest and that the sale and adjudication of the property be annulled and avoided, that she be decreed the owner of the two lots and buildings thereon so illegally seized and sold, and that she be maintained in the possession of the same. The plaintiff sets up numerous grounds on which she alleges her right to have the proceedings thrown out in relation to the illegal sale of her property.

The defendant excepts that the plaintiff has no cause of action, and prays that all her allegations set forth in the petition be stricken out and set aside, and that he be dispensed from answering, and that so much of the plaintiff's petition as prays for judgment forbidding the further execution of the judgment under which the property was seized, be also set aside, dismissed and stricken out; and he prays for general relief. The exception was sustained, and the plaintiff's suit dismissed. Judgment was in like manner rendered against the plaintiff dismissing her suit on exception of Marie Jeanne Piseros, made a party defendant. From these judgments the plaintiff appeals.

It appears from the record that the property in question although purchased in the name of the wife was purchased during her marriage,

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as the husband appears as a party to the act authorizing the purchase; and the property so purchased must, in the absence of anything being shown to the contrary, be considered community property, and liable for the community debts.

It is moreover shown that the wife was a party to an act of mortgage by her husband of this same property in favor of Marie Jeanne Piseros to secure the payment of the purchase price of the same, and formally renounced all her rights upon the property. The plaintiff has failed to make out her case.

Judgment affirmed, with costs in both courts.

Rehearing refused.

No. 5269.

SUCCESSION OF JOHN K. ELGEE. E. T. PARKER, Public Administrator
v. BESSIE ELGEE GAUSSEN, Executrix.

The court below having made an order, in a proceeding to which the defendant was not a party, appointing the plaintiff provisional administrator of the succession of defendant's father in the place of said defendant, the executrix thereof, and putting him in possession of the property thereto belonging, the defendant took a rule against the plaintiff to set aside this interlocutory order on the ground that it was improvidently granted and not warranted by law. The plaintiff appeals from the setting aside of the order.

The plaintiff can suffer no irreparable injury by the decree from which he has appealed. It simply revokes an order disturbing the defendant's possession of the property of her father's estate, and permits her to continue to discharge the duties of executrix of the succession until the suit is tried, and it is determined whether she shall be removed from office or not. Whether her administration pending the suit will be beneficial or injurious, is a question which concerns the heirs and creditors, but it is a matter in which the public administrator has no interest. The appeal must be dismissed.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. W. O. Denegre*, for plaintiff and appellant. *Alfred Philips, Finney & Miller*, for defendant and appellee.

WYLY, J. In a suit by the public administrator against the defendant to destitute her of the office of executrix of the succession of her father, John K. Elgee, the court made an order, in a proceeding to which the defendant was not a party, appointing the plaintiff provisional administrator and putting him in possession of the property. The defendant then took a rule against the plaintiff to set aside the interlocutory order on the ground that it was improvidently granted, and that it was unwarranted by law. From the judgment on this rule setting aside the order alleged to have been improvidently granted, the plaintiff appeals.

The appellee moves to dismiss the appeal on several grounds, the most important being that the judgment appealed from is an interlocutory order that can not work the plaintiff an irreparable injury.

Succession of Elgee.

The plaintiff, the appellant herein, is neither a creditor nor heir of John K. Elgee. What interest he can have in complaining that the defendant, the executrix of the succession of her father, has not faithfully performed the trust confided to her, and therefore should be destituted of office, it is difficult to imagine. But the precise question is, what irreparable injury can the plaintiff suffer by the interlocutory order from which he has appealed.

We can see no injury that can result to the appellant from the order of which he complains. It simply revokes an order disturbing the defendant's possession of the property and permitting her to continue to discharge the duties of executrix of her father's succession until the suit is tried and it is determined whether she shall be destituted of office or not. Whether her administration pending the suit will be beneficial or injurious, is a question which concerns the heirs and creditors; but it is a matter in which the public administrator has no interest. The order can not work him an irreparable injury.

It is therefore ordered that the appeal herein be dismissed at the costs of the appellant.

See the case of succession of Walter Winn, 26 An. 162.

No. 4080.

HENRY T. SORREL v. HENRY LAURENT.

This is a suit on a promissory note secured by pledge. It is brought against the defendant, as a resident of the parish of Iberville, and was served on him personally in the parish of Orleans. As it is a personal action, unattended with any conservatory writ, the court *a qua* was clearly without jurisdiction against defendant.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Hornor & Benedict*, for plaintiff and appellee. *Breaux, Fenner & Hall*, for defendant and appellant.

HOWELL, J. Plaintiff, a resident of the State of Ohio, sued the defendant, as a resident of the parish of Iberville in this State, and served him personally in the parish of Orleans, on a promissory note secured by pledge of movables in possession of their attorneys in New Orleans for plaintiff, and prayed for judgment with privilege on the property held in pledge, and that it be sold to satisfy the judgment. From a judgment confirming a default the defendant has appealed.

The judgment is erroneous. See C. P. 162 and the case of — .

It is a personal action, unattended with any conservatory writ. The court *a qua* was clearly without jurisdiction over defendant.

It is therefore ordered that the judgment of the court *a qua* be annulled and the suit dismissed at plaintiff's costs in both courts.

Mrs. Lizzie Clara Davis v. Bradley, Wilson & Co.

No. 3474.

MRS. LIZZIE CLARA DAVIS, wife of FRANK E. MUMFORD, and her minor child, R. E. SMITH, v. BRADLEY, WILSON & CO.

This suit is brought on a bill of exchange. The fact that the plaintiffs acquired the instrument after its maturity must determine the case against them. This rule seems to admit of no exception, that a party, taking a bill or note after its maturity, takes it subject to all the equities and exceptions that might exist between the original parties.

It is a principle of the commercial law that the bare fact that a negotiable instrument is unpaid at its maturity is a circumstance sufficient to raise the presumption of fraud, and that there exists some solid reason why it was not paid.

The law of merchants being the law of honor, all bills and notes, the instruments of commercial transactions, will, it is presumed, be promptly paid when due.

A negotiable instrument, unpaid at its maturity, shows upon its face that it was dishonored, and a person who takes it can not be allowed to claim the privilege of a *bona fide* holder without notice.

The plaintiff in this case acquired the bill long after its maturity. The circumstances under which the owner thereof was deprived of its possession, precludes the inference that the captors acquired by the rules of war a legal title.

The want of title in any of the parties acquiring the instrument after its maturity, could therefore be set up by the defendants against the holder.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* Jury trial. *Fellows & Mills, J. R. Beckwith*, for plaintiffs and appellants. *Lea, Finney & Miller*, for defendants and appellees.

TALIAFERRO, J. In this case suit is brought upon a bill of exchange for \$22,140, drawn at Huntsville, Alabama, on the second of April, 1862, by Joseph C. Bradley, on Bradley, Wilson & Co., of New Orleans, to the order of and indorsed in blank by Thomas W. White, due seventeenth—twentieth of July, 1863.

The answer is that neither the plaintiffs nor any of them have or ever had any lawful title to the instrument sued upon, or that R. W. Smith, from whom it is pretended plaintiffs derived it, ever had any lawful title to it, or that any of them gave any value for the same. The defendants aver that the bill of exchange was first issued to the State Bank at Charleston, South Carolina, and continued to be the property of that bank until it was extinguished, long after its maturity, by the defendants paying it in full to the said bank on the twenty-seventh January, 1866.

There was a verdict of a jury and judgment of the court *a qua* in favor of the defendants, and the plaintiffs have taken this appeal.

During the late war, we gather from the evidence that the assets of the State Bank of Charleston were removed for safety to Camden, South Carolina. In February, 1865, as General Sherman was marching through South Carolina, and two days before he captured Columbia, the assets of the bank (among them the bill of exchange in controversy) were packed in a box and carried off from Camden by the cashier and his brother. Three days after the taking of Columbia, these per-

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sons, endeavoring to escape with the property of the bank and many valuables besides, were overtaken and despoiled of the whole by an armed force belonging to the Fifteenth Army Corps, United States Army, under command of General Logan, the soldiers taking forcible possession of the box, breaking it open and destroying part of its contents and carrying off the remainder.

There is nothing that we find showing how or when R. W. Smith, now deceased, the former husband of Mrs. Mumford and father of the minor, came possessed of the bill sued upon, or how the plaintiffs came by it. They seem to consider that the naked possession of the instrument suffices to enable them to recover. The defendants set up specially that the State Bank of South Carolina, to whom they paid the amount of the bill, was the first and only holder for value; that it never parted with its title or ownership, and that it lost its possession by unlawful violence long after the maturity of the paper. They specially deny any legal title in the plaintiffs, or that they or those they derived it from ever gave value for it.

This case is warmly contested, and numerous authorities are invoked by each party. The plaintiffs show that the alleged settlement of the defendants with the Bank of Charleston was long subsequent to their knowledge of the plaintiffs' possession of the bill and the demand of the latter on defendants for its payment. This is known to have taken place in September, 1865, while the payment to the bank by the defendants did not occur until twenty-seventh of January following. We think the fact that the plaintiffs acquired the instrument after its maturity must determine the case against them. The rule seems to admit of no exception that a party taking a bill or note after its maturity, takes it subject to all the equities and exceptions that might exist between the original parties. It is a principle of the commercial law that the bare fact that a negotiable instrument is unpaid at its maturity, is a circumstance sufficient to raise the presumption of fraud, and that there exists some valid legal reason why it was not paid. The law of merchants being the law of honor, all bills and notes, the instruments of commercial transactions, it is presumed, will be promptly paid when they become due. A negotiable instrument unpaid at its maturity shows upon its face that it was dishonored, and a person who takes it can not be allowed to claim the privilege of a *bona fide* holder without notice. The plaintiff relies strongly on the authority of the case of *Murray v. Lardner*, 2 Wallace 118. But we do not see how it covers the case at bar. In *Murray v. Lardner* the controversy was between a party who in good faith had bought, in the regular course of business for their full market value, three coupon bonds of the Camden and Amboy Railroad Company, not due, as it seems from the tenor of the

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decision, payable to bearer, and the party from whom they had been stolen. The court seems to have assimilated the bonds to ordinary commercial paper, and to decide that they are subject to the law of commercial paper. Speaking of the bonds in that case the court says: "The possession of such paper carries the title with it to the holder. The possession and title are one and inseparable. The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world." We are referred to no case where the original holder had been deprived of his possession after maturity. It is clear the plaintiffs acquired the bill long after its maturity. The circumstances under which the bank was deprived of its possession, preclude the inference that the captors by the rules of war acquired a legal title. The want of title in any of the parties acquiring the instrument after its maturity; could, therefore, be set up by the defendants against the holder. We conclude that the defense is made out.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 4374.

MRS. EMILIE HOA v. MRS. MARY CLANCY.

When the district court had before it sufficient authentic evidence to justify an order of seizure and sale, if there were irregularities in the advertisement of the property, they are not to be corrected in an appeal from said order.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Frank McGloin*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

MORGAN, J. The only question for us to consider in an appeal from an order of seizure and sale, is whether the district court had before it sufficient authentic evidence to justify the issuing of the order. 6 R. 58; 21 An. 52. In the case under consideration, we have the note and the mortgage imputing a confession of judgment. This is sufficient. If there were any irregularities in the advertisement of the property, they are not to be corrected in an appeal from the order of seizure and sale.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with ten per cent. damages for a frivolous appeal.

Rehearing refused.

No. 5167.

STATE OF LOUISIANA v. A. A. MAGINNIS.

The objection that the assessment of defendant's property is excessive, is a matter that can not be examined in the present action for the amount of his State taxes.

The Auditor merely calculates the proportion that each payer must pay. The discharge of this duty in no manner involves the levying of a tax by the Auditor. It is the State which levies the tax and not the Auditor.

The building of levees in Louisiana is a public enterprise or work which concerns directly at least half of the people of the State, and indirectly the whole State. Of the propriety of constructing levees the General Assembly is the exclusive judge. They have the right to assess a tax and to expend the money arising therefrom in the construction of levees, or in the erection of such public works as they may deem beneficial. No individual taxpayer has the right to resist the exercise of a discretionary power confided to the Legislature.

The law making power can certainly assess a tax to pay the capital and interest of a debt which it had at the time authority to contract.

The objection raised in this case, that acts No. 4 and 27 of the session of 1871, under which the assessments were made, are unconstitutional and void, and that it is a violation of article 10 of the constitution of this State and of article 5, section 1, of the fourteenth amendment of the constitution of the United States to attempt to impose upon the whole people of the State the burden of building and protecting levees for the benefit of the owners of property in a section of the State by way of taxation on the whole State, has become *res judicata* in the case of *State ex rel. Levee Company v. Charles Clinton, Auditor*, 25 An. 401.

It is no ground to resist a tax because the State debt has reached the constitutional limitation, unless the object for which the tax is levied or the law authorizing it is unconstitutional and void.

That the Legislature has improperly diverted a trust fund, is a question that may concern the owner or owners of that fund. It is a matter in which the respondent has no interest.

This court can not presume, in the absence of proof on the subject in the record, that the New Orleans, Mobile and Chattanooga Railroad Company has failed to fulfill the conditions on which the State has issued her bonds as an indorsement for said company, and that thereby the State is released from an obligation incurred before the adoption of the constitutional amendment limiting the State debt to twenty-five millions.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, and *Henry O. Dibble*, Assistant Attorney General, for plaintiff and appellee. *Fellows & Mills*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment against him for the amount of his State taxes for 1871, with attorney's fees and damages and costs.

The first objection is, that the assessment of defendant's property is excessive. This is a matter that can not be examined in the present action.

The next is, that the item for six and one-half mills per dollar for interest on the State debt, one and one-half mills per dollar for levees, and two and one-half mills per dollar for special levee tax are illegal, null and void, because the levying of a tax is a legislative act and can not be delegated to the Auditor. This court has frequently held that the Auditor merely performs the duty of an accountant or an arithmetician in fixing the rate of taxation after the return of the assessment rolls, so as to raise the amount assessed by the State to pay the interest

on the State debt. The discharge of this duty in no manner involves the levying of a tax by the Auditor. The tax is levied by the State, and the Auditor merely calculates the proportion that each taxpayer must pay.

The next objection is, that the two items of one and one-half mills and two and one-half mills for levee and special levee purposes, the two mills levee construction fund tax, and the two mills levee repair fund tax, and the one mill special tax, called the funding expense tax, are unconstitutional, null and void for this: They are levies for an illegal purpose, and such as the State of Louisiana had no right to levy; that the purpose or object for which the said two items of tax of one and one-half and two and one-half mills and the two items of two mills each were levied, was for raising money to pay the interest and reduce the principal of a debt created for the avowed object of building levees on the banks of the Mississippi and other water courses in Louisiana subject to overflow, or to pay the costs of levees already built or constructed or proposed to be built or constructed; that said levees were solely for the protection and consequent increase of the value of the property of individuals, and only incidentally beneficial to the State and the respondent, and in which neither had a direct interest; that the consideration of the debt aforesaid was exclusively for the benefit of a section of the State, and resulted only incidentally for the general welfare; that the Legislature had no right to create a debt, or levy a tax beneficial to the owners of property of a portion or section of the State, and the statutes authorizing the tax complained of violate the constitution of this State and the constitution of the United States.

The building of levees in Louisiana is a public enterprise or work which concerns directly at least half the people of the State, and incidentally the whole State. Of the propriety of constructing levees, the General Assembly is the exclusive judge, because we find in the constitution no limitation upon the right of the people, through the General Assembly, to exercise the power. They have the right to assess a tax and to expend the money arising therefrom, if they choose, in the construction of levees, or in the erection of such public works as they may deem beneficial. No individual taxpayer has the right to resist the exercise of a discretionary power confided to the Legislature. Having authority at the time to contract the debt, the law making power can certainly assess a tax to pay it, capital and interest.

The respondent, further answering, objects that the levee taxes of which he complains are assessments or levies made for the benefit of the Louisiana Levee Company, a corporation created by the State of Louisiana, with whom, he alleges, the Legislature has contracted a debt after the debt of the State had already reached the constitutional

limitation of twenty-five millions; that acts No. 4 and 27 of the session of 1871, under which the assessments were made, are unconstitutional and void; that the attempt to impose upon the whole people of the State the burden of building and protecting the levees as aforesaid for the benefit of the owners of property in a section of the State, by way of taxation on the whole State, is violative of article 10 of the constitution of this State, and article 5, section 1, of the fourteenth amendment of the constitution of the United States.

In the case of *State ex rel. Levee Company v. Charles Clinton, Auditor*, 25 An. 401, this court expressly decided adversely to the respondent herein, the precise question raised in this objection.

And lastly, the respondent in his answer objects that the one mill tax added to the tax bill sued on violates the constitution because it increases the amount of the State debt, and that the statute creating it is void, in that it diverts a trust fund not belonging to the State.

It is no ground to resist a tax because the State has reached the constitutional limitation, unless the object for which the tax is levied or the law authorizing it is unconstitutional and void. That the Legislature has improperly diverted a trust fund is a question that may concern the owner or owners of that fund; it is a matter in which the respondent has no interest. These are the main defenses raised in the answer.

In the elaborate brief filed by the learned counsel of the respondent many interesting questions are discussed, but we regard the important points as settled in the cases of the *State ex rel. New Orleans, Mobile and Texas Railroad v. James Graham et al.*, 23 An. 622, the *State v. The North Louisiana and Texas Railroad Company*, 25 An. 25, and the *State ex rel. the Louisiana Levee Company v. Charles Clinton, Auditor*, 25 An. 401.

The respondent, however, insists that act 95 of the acts of 1871 is unconstitutional, because the bonds issued under it virtually created a debt in contravention of the constitutional limitation of twenty-five millions; that the debt in lieu of which they were given had lapsed, that is, the obligation of the State to indorse the second mortgage bonds of the New Orleans, Mobile and Chattanooga Railroad Company was conditioned upon the performance of certain work by said company which they failed to perform.

There is no proof in the record that the company failed to comply with its contract. We can not presume they have, and thereby released the State from the obligation given in exchange for an obligation incurred by it, before the adoption of the constitutional amendment limiting the State debt to twenty-five millions.

Judgment affirmed.

Rehearing refused.

State of Louisiana v. Clinton, Auditor, and Dubuclet, Treasurer.

No. 4619.

STATE OF LOUISIANA v. CHARLES CLINTON, Auditor, and A. DUBUCLET,
Treasurer. G. A. SHERIDAN, intervenor.

The objection to the validity of the bonds issued under act 32, approved February 25, 1870, to pay for work on the levees of the State, has no force. Said act is not in conflict with articles 110 and 118 of the constitution of the United States.

The payment by the State in the form of bonds, for work on the levees of the State, is not taking private property, or divesting vested rights in the meaning of the constitution, State or federal. The question as to whether a tax shall be levied on all the taxable property of the State, or only on the particular localities where the work is done, is a question of policy to be determined by the Legislature and not by the courts, there being no constitutional regulation on the subject.

Whether the original proprietors were bound or not to keep up the levees, does not affect the power or right of the State to do so, and, in this proceeding, the court can not pass on the question of consideration if it be a matter for judicial inquiry.

Whether these were the necessary parties to institute a suit or not in this instance *before* the intervention of Sheridan, the holder of some of the bonds in question, it is quite sure that, *after* he intervened, to the extent of his interest in the bonds, there was a plaintiff in injunction, the State; and a defendant, Sheridan; and there was thus a joinder of issue.

The act, No. 32, called in question, was approved on the twenty-fifth of February, 1870, about two months before the adoption of the constitutional amendment referred to. It is impossible therefore to imagine how that law can be affected by said amendment.

The construction of levees can not be called a *local* work in Louisiana, but even should such a work be local in its character, there is no prohibition against the General Assembly authorizing local improvements to be made and providing for the payment thereof.

Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes and what does constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which can not be controlled by the courts, except perhaps when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.

If the theory of the plaintiff be correct, that the appropriations for levees and railroads are for private purposes and not legitimately the subjects for legislation, and therefore, that the debts created for such purposes are unconstitutional—*a fortiori* would bonds, issued in aid of the property banks of this State be void—and thus, all the bonded debt of the State, created during the last forty years, would be null and void. Courts, whose duty it is to deal with facts and laws, can not seriously be expected to adopt such vagaries.

No provision of the constitution has been cited, which forbade the State to contract the debt in question, and if there be none, as is believed to be the fact, the debt is valid.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field, Attorney General, J. Q. A. Fellows, J. B. Cotton, J. S. Whitaker, L. Madison Day, for plaintiff and appellant, W. O. Denegre, for the Auditor. Kennard, Howe & Prentiss, for intervenor.*

HOWELL, J. This appeal presents the intervention of one G. A. Sheridan, as holder of certain "levee bonds," in the injunction suit of the State against the Auditor and Treasurer, a branch of which we have just decided. The matter involved in this proceeding is the validity of the bonds issued under act 32, approved February 25, 1870, to pay for work on the levees of the State, the payment of the coupons attached thereto having been enjoined by the State on the grounds:

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First—That the Legislature had no power to create said obligation.

Second—That the proprietors of property fronting on the water courses of Louisiana subject to overflow, had contracted in the original purchase of the property to keep up the levees in front of their lands, and had purchased the same by reason of said condition at a much reduced price.

Third—That the property in the State not subject to overflow can not constitutionally be taxed for the protection of lands which are so subject, that is, the property of the whole State can not be taxed for the benefit of a part of the State.

Fourth—That there is no valid consideration for said bonds.

First and third. It is urged that the law 32 of 1870, authorizing the bonds, is in conflict with articles 110 and 118 of the constitution of the State and the fifth amendment of the constitution of the United States, which prohibit the divestiture of vested rights, or the taking of private property, except for public purposes and for just and adequate compensation, and require taxation to be equal and uniform, and therefore the Legislature was without authority to create the debt or impose the tax, as is done, for its extinguishment. We are unable to perceive the conflict. The payment by the State, in the form of bonds, for work on the levees of the State, is not taking private property or divesting vested rights, in the meaning of the constitution, State or federal. The State simply caused certain work or improvements of a public character to be done or made, which, in the opinion of the Legislature, was for the benefit of the State and some or all of its inhabitants, which the Legislature had the power and authority to do, as it is not prohibited by the constitution. The question as to whether a tax shall be levied on all the taxable property of the State, or only on the particular localities where the work is done, is a question of policy to be determined by the Legislature and not by the courts, there being no constitutional regulation on the subject.

The other grounds are equally untenable. Whether the original proprietors were bound or not to keep up the levees, does not affect the power or right of the State to do so. And in this proceeding we can not pass on the question of consideration if it be a matter for judicial inquiry.

Judgment affirmed.

ON REHEARING.

LUDELING, C. J. This suit was instituted by the Attorney General against the Auditor and Treasurer of the State, to restrain them from paying the interest on certain bonds of the State, etc. The alleged

grounds for the injunction were: that the said bonds were illegal, unconstitutional, null and void; that they were issued in violation of the constitutional amendment limiting the State debt; that they had no legal consideration, and were issued to persons who had no legal claim against the State, to be paid out of the revenues derived from taxation.

In addition to the above objections it was urged that it was the duty of the front proprietors to keep up the levees, as they had acquired their lands burdened with that obligation, and that the State could not levy a tax on all the property of the State to keep up the levees, because that would be taking private property for the benefit of private individuals, and not for public purposes and without any consideration, which would be in violation of the constitution of the United States as well as of the State.

George S. Sheridan, the holder of some of the bonds, the payment of the accrued interest whereof was enjoined, intervened in the suit, moving to have the injunction dissolved, on the grounds that the injunction was issued without any affidavit to the truth of the alleged reasons for the injunction; that the Attorney General, *ex proprio motu*, or by direction of the Governor, had no authority to bring this suit; that there is no party defendant to the original injunction, the State being both plaintiff and defendant; that the Attorney General can not cause to be enjoined a State officer, in the executive or legislative department, to prevent him from doing an official act which the law commands him to do; and lastly, that all the alleged reasons to show the illegality of the bonds are not true.

Pretermittting the expression of an opinion as to the regularity of the proceedings by the Attorney General against the Auditor and Treasurer, who by law can not appear in court to defend themselves but must be represented by the Attorney General, and passing by the other serious questions raised in the motion to dissolve the injunction, we will consider the questions on the merits of this controversy, as that course will better subserve the ends of justice.

Whether these were the necessary parties to constitute a suit or not, before the intervention of Sheridan, it is quite sure that after he intervened, to the extent of his interest in the bonds, there was a plaintiff, the State; and a defendant, Sheridan; and that there was thus a joinder of issue. There was judgment dissolving the injunction and the State has appealed.

It is admitted that Sheridan holds a number of the bonds issued under act No. 32, approved February 25, 1870, entitled "An Act to provide means for work done or to be done, on the levees of the State, under contract with the Board of Public Works, by the issue of bonds

of the State to the amount of \$3,000,000, and to provide for the redemption of said bonds." It is alleged in the petition that the amendment of the constitution, limiting the State debt, was promulgated on the fifteenth December, 1870. It is also alleged that the act No. 32, called in question, was approved on the twenty-fifth of February, 1870, about ten months before the adoption of the amendment. It is impossible, therefore, to imagine how that law can be affected by the constitutional amendment.

The other questions raised are, whether or not the building of the levees of the State is a proper subject for legislation, and whether a general tax can be levied by the Legislature to build and maintain the levees of the State? The plaintiff insists that the General Assembly can not undertake to build levees, because the front proprietors acquired their title subject to the burdens of keeping up the levees. If the statement were strictly accurate, we do not perceive the force of the argument, for if, in the judgment of the General Assembly, the public interests required that the levees should be built and maintained under a general system or otherwise by the State, we know of no good reason, and none has been furnished in the briefs, why the Legislature should not command it, and thus shift the burden from the front proprietors. See *Tardos v. Jefferson*.

It is contended that the levees are local works for the benefit of individuals in particular localities. A work which extends along the banks of the Mississippi river, through the whole length of the State, along the banks of Red river, Black river, the Atchafalaya and Teche, and other streams in this State can not seriously be called local in Louisiana. Sad experience has taught the people of Louisiana that the building and maintenance of the levees is a work too gigantic for even the State to successfully complete, and they are now addressing their prayers to the general government to come to their relief. It is an error to say that the levees benefit only the front proprietors, or even only those whose lands are subject to inundation, for the prosperity of one part of the State affects beneficially all the parts thereof by lessening the proportion of the burden of each. But if the work had been local in its character, we know of no prohibition against the General Assembly authorizing local improvements to be made and providing for the payment thereof. But whether the work be local or not; whether the tax shall be levied upon all the property of the State, or only upon the property supposed to be benefited; whether the policy of taxing the whole State to build the levees be good or bad; whether the purpose of the tax be for the public good or not, are all questions for the legislative discretion, over which courts have no control. In *Cooley's Constitutional Limitations*, p. 128, when treating of the lim-

itations on the power of the Legislature to expend money in public improvements, the author says:

“Some of these are prescribed by the constitution, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion and conscience. The legislature is to make laws for the public good and not for the benefit of individuals. It has control of the public moneys and should provide for disbursing them for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which can not be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. When the power which it exercises is legislative in its character, the courts can enforce only those limitations which the constitution imposes and not those implied restrictions, which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives.”

And this is the settled jurisprudence of this State on that subject. In the *State v. Volkman* this court said: “That the Legislature in its sphere is supreme in all respects, save when restricted by the constitution of the State or the United States.” See also *State ex rel. Attorney General v. Fagan*, 22 An. 350, and case there cited.

If the theory of the plaintiff be correct, that the appropriations for levees and railroads are for private purposes, and not legitimately the subjects for legislation, and therefore, that the debts created for such purposes are unconstitutional—a *fortiori*, would bonds issued in aid of the property banks in this State be void—and thus, all the bonded debt of the State, created during the last forty years, would be null and void. This may be a pleasant dream for overburdened taxpayers to indulge, but courts, whose duty it is to deal with facts and laws, can not seriously be expected to adopt such vagaries. The question of eminent domain does not arise in this case; no private property has been expropriated by the law in question.

“The real question in this suit is, had the General Assembly the power to contract the debt evidenced by those bonds? We have not been cited to any provision of the constitution which forbade it, and if there be none, which we believe is the fact, the debt is valid. We therefore adhere to the decree heretofore made in this case.

Mithoff v. Bohn.

No. 3317.

WILLIAM MITHOFF v. AUGUSTE BOHN.

This suit is brought on a judgment in which the original obligation was merged. In the authentic act by which the defendant acquired from Byrne, Vance & Co., his title to the real estate subject to the plaintiff's judicial mortgage, the defendant bound himself expressly to pay whatever amount Mithoff, the plaintiff, might recover against Byrne, Vance & Co., in a suit then pending and not finally determined. Thus, it was a condition of the sale to Bohn, that he should pay whatever judgment, if any, Mithoff should obtain in the court of last resort. The amount of such judgment, if finally obtained against Byrne, Vance & Co., was to constitute part of the consideration to be given for the property by Bohn.

This court is not able to see what interest or right the defendant can have in protracting this litigation on the pretense that confederate money was the basis of the contract originally entered into between Mithoff and Byrne, Vance & Co., and which culminated in a judgment.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. C. Roselius and Alfred Philips*, for plaintiff and appellee. *Finnoy & Miller, T. J. Cooley, E. Phillips*, for defendant and appellant.

TALIAFERRO, J. The plaintiff having obtained a judgment against Byrne, Vance & Co., for \$22,950 with interest, acquired, by the recording thereof, a judicial mortgage against their property.

Subsequently, the defendant purchased of Thomas Byrne, the property subject to that judicial mortgage. The plaintiff in this case brings suit against Bohn as third possessor to enforce the judicial mortgage against the property.

The defendant answered, denying the existence of the judicial mortgage, and alleging that if any such mortgage is found recorded in the office of recorder of mortgages the same ought to be canceled and annulled

He further alleges that Mithoff the plaintiff had been perpetually enjoined from executing the judgment against Byrne, Vance & Co., by a decree of the Sixth District Court. And, lastly, he sets up the objection in that the original judgment of Mithoff against Byrne, Vance & Co., was based on an obligation, the consideration of which was confederate money. There was judgment in favor of the plaintiff and the defendant has appealed.

First—The defense that Mithoff had been perpetually enjoined against executing his judgment against Byrne, Vance & Co., by a decree of the Sixth District Court, we do not find is made out by the evidence. On the contrary, it appears that the matter was decided adversely to the pretensions of the defendant by the judgment rendered by the Sixth District Court and confirmed on appeal. 24 An. p. 297.

Second—This suit is brought on a judgment in which the original obligation was merged. By the authentic act by which the defendant acquired title to the real estate subject to the plaintiff's judicial mortgage, the defendant bound himself expressly to pay whatever amount

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Mithoff, the plaintiff, might recover against Byrne, Vance & Co., in the suit then pending, but not finally determined. It was a condition of the sale to Bohn, that he should pay whatever judgment, if any, Mithoff should obtain in the court of last resort.

The amount of such judgment, if finally obtained against Byrne, Vance & Co., was to constitute part of the consideration to be given for the property by Bohn. We are not able to see what interest or right he can have in protracting this litigation on the pretense that confederate money was the basis of the contract originally entered into between Mithoff and Byrne, Vance & Co., and which culminated in a judgment.

The decree rendered in this case by the lower court we think correct.

Judgment affirmed.

Rehearing refused.

No. 5180.

SUCCESSION OF EDMUND HOGAN. On opposition of **JEREMIAH HOGAN** to account filed by **PETER GALLAGHER, Executor.**

The delinquent executor, who abandoned his trust and appropriated the funds confided to him, stands without equity before the court. He is in no position to complain of the penalties prescribed by law for not depositing the funds in bank.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Gilmore & Sons*, for executor and appellant. *M. A. Dooley*, for opponent to account and appellee.

WYLY, J. In October, 1836, Edmund Hogan died in this city, leaving a last will by which he instituted Jeremiah Hogan, his son, his universal legatee, and named Peter Gallagher his testamentary executor. The will was duly proved, and on fifteenth December, 1836, letters testamentary issued to said Gallagher.

In 1840, Gallagher left the State permanently, going to Texas to reside, without rendering an account. On seventeenth February, 1869, Jeremiah Hogan was recognized as sole and only heir and universal legatee of Edmund Hogan, deceased, and ordered to be put in possession. In May following the universal legatee filed a petition, which was served on the executor personally (he being temporarily in the city), requiring him to file an inventory and render an account according to law.

In bar of the proceeding certain exceptions were pleaded, which were properly overruled for the reasons assigned by the judge.

The case is now before the court on an opposition to the account which the executor was required to render.

The court condemned the delinquent executor to pay over \$742, the amount in his hands found to belong to the succession, and also gave judgment against him for twenty per cent. per annum damages on said amount from fifteenth September, 1840, for failing to deposit said money in bank, as required by law.

From this judgment the executor appeals.

The proof fully sustains the judgment. The delinquent executor, who abandoned his trust and appropriated the funds confided to him, stands without equity before the court. He is in no position to complain of the penalties prescribed by law for not depositing the funds in bank.

Judgment affirmed, appellant paying costs of appeal.

Rehearing refused.

No. 3471.

STATE OF LOUISIANA ex rel. H. C. WARMOTH v. JAMES GRAHAM,
Auditor.

The absence of the Governor from the State for a few hours, or a few days, creates no vacancy in the office, and does not authorize the assumption of the duties, prerogatives and emoluments thereof by the Lieutenant Governor during said absence. It must be, under a proper construction of article 53 of the constitution, such an inability to discharge the duties of the office, as well as such absence from the State, as would affect injuriously the public interest.

It is manifest that the absence of the Governor from the State is to be ascertained on some proof accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as Governor of the State. There being no provision of law for the mode in which the Governor is to manifest to the public his absence from the State, it is necessarily left to his discretion, subject to his responsibility to the people.

This court does not think that it was ever contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor or Speaker of the House of Representatives should slip into his seat, the moment he stepped across the borders of the State.

APPEAL from the Eighth District Court, parish of Orleans. *Ohas. M. Emerson*, Judge of the Third District Court, acting in the absence of Judge Dibble. *Semmes & Mott, Wm. Grant*, for relator and appellee. *Hornor & Benedict*, for respondent and appellant.

LUDELING, C. J. The relator avers that his salary as Governor of the State was due him for the periods from the sixth to the nineteenth of May, 1871, and from the twenty-sixth of June to the seventeenth of July, 1871; that he drew his warrant therefor, on the Auditor of Public Accounts on the twenty-second of September, 1871; that payment of this warrant was refused on the grounds that the relator was absent from the State during said periods, and that the duties and prerogatives of Governor devolved on the Lieutenant Governor, to whom the salary

State of Louisiana ex rel. Warmoth v. Graham, Auditor.

of Governor for said periods had been paid. There was judgment in favor of the relator and the defendant appealed.

The question to be decided is, does the absence of the Governor from the State for a few hours or a few days create a vacancy in this office, and authorize the assumption of the duties, prerogatives and emoluments thereof, by the Lieutenant Governor, during said absence?

The constitutional provisions on the subject are contained in articles 53 and 54 of the constitution.

Article 53 says: "In case of impeachment of the Governor, his removal from office, death, refusal or inability to qualify or to discharge the powers and duties of his office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the Lieutenant Governor, for the residue of the term, or until the Governor, absent or impeached, shall return or be acquitted, or the disability be removed," etc.

Article 54 declares that the officer discharging the duties of Governor during his administration, shall receive the compensation to which the Governor would have been entitled.

It is evident, if the Lieutenant Governor be authorized to exercise the functions of the Governor during any temporary absence of the Governor from the State, he may also, whenever the Governor is unable to attend to the duties of his office on account of sickness—in case "of inability to discharge the powers and duties of his office." We do not believe this to be the meaning intended by the framers of the constitution. The inability to discharge the duties of the office as well as the absence from the State, spoken of in the article, are such as would affect injuriously the public interest. The mere absence, at Pass Christian, within a few hours' run of the Capital, could not, by any possibility, affect the public interest.

How is the absence of the Governor to be ascertained? It is manifest, that there ought to be some certain proof, accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as Governor of the State. As the law makes no provision for the mode in which the Governor shall manifest to the public his absence from the State, it necessarily is left to his discretion, subject to his responsibility to the people. If the interests of the State should suffer in consequence of his prolonged absence, he would be amenable to public sentiment and to the control of the impeaching power of the State.

Some public record should be made of the intended absence, or the Governor should publicly place the Lieutenant Governor in charge of the government, so that the time of absence shall appear of record, and during such absence the acts of the acting governor would be of

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unquestionable validity. Anything less than this might create confusion and uncertainty. We do not think it was ever contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor or Speaker of the House of Representatives should slip into his seat, the moment he stepped across the borders of the State.

It is therefore ordered, that the judgment of the lower court be affirmed with costs.

Rehearing refused.

No. 3360.

HEIRS OF E. A. JOHNSON v. BRADISH JOHNSON.

In this case, it is shown that the heirs of George W. Johnson ratified and confirmed his will; that they were recognized and put in possession of their respective shares; that his succession has been fully administered; that the dispositions of the will were carried into execution as fully as it was possible, and that his executors have been discharged. After all these proceedings, and in the face of these solemn acts, none of the heirs can now be heard, when they seek to annul the will in any of its parts.

A PPEAL from the Sixth District Court, parish of Orleans. *Oooley, J. Leovy, Monroe & Hart*, for plaintiffs and appellants. *Lea, Finney & Miller, J. A. Campbell*, for defendant and appellee.

MORGAN, J. George W. Johnson died in September, 1856. He owned large estates in New York and in Louisiana.

Forming part of his possessions in this State, was a tract of land known as the Woodland plantation, situate in the parish of Plaquemine, of which he owned the eleven-sixteenths. The other five-sixteenths, belonged to his brother, Bradish Johnson. He also owned twenty-five slaves in his own right, twelve slaves in common with his brother Bradish, and the eleven-sixteenths of one hundred and sixty-one others.

He died without leaving any forced heirs, and bequeathed his property to his brothers. To Bradish he gave the Woodland plantation and all the improvements thereon. Upon this bequest he imposed a charge. This was, that after enjoying the fruits and revenues of this plantation with the result of the labor of all the slaves thereon, for five years, he was to liberate them all, send them to Liberia, and give them each fifty dollars.

His will was accepted by his heirs as a just disposition of his property, and in two separate deeds, made at different periods, they ratified the same. Under the will and in virtue of these acts, each heir was put in possession of the share which was coming to them.

His heirs were three brothers. It is the heirs of one of these brothers who are the plaintiffs in this suit.

Heirs of Johnson v. Johnson.

In 1857, the Legislature of Louisiana passed a law prohibiting the emancipation of slaves.

In 1858, J. D. Johnson and E. A. Johnson (father of the present plaintiffs) instituted suit against Bradish Johnson, in which they alleged that the provisions of George Johnson's will by which he directed the emancipation of his slaves were null and void, the same being prohibited by law. They prayed that all of the provisions of his will relating to the Woodland plantation and the negroes thereon might be declared null and void, as contrary to the laws and policy of the State, and they prayed to be decreed to be the owners each for one-third thereof. This suit was decided by the Supreme Court to be premature. The opinion was read on the fifteenth of June, 1859. It has not been reported.

Subsequently, John Johnson instituted another suit in which he declared that Bradish Johnson, in defiance of the laws of the State, contemplated the emancipation of the slaves mentioned in George Johnson's will, and, averring that he feared they would be removed out of the State, applied for and obtained an injunction directed against him prohibiting him from so doing. This suit remained on the docket until twelfth November, 1861, when it was dismissed.

The slaves were never sent to Liberia, and they were not emancipated by Bradish within the five years as required by the will. The heirs of E. A. Johnson, claiming through their father, ask that they be decreed to be the owners of the one third of the eleven-sixteenths of the Woodland plantation, and that Bradish Johnson may be compelled to account to them for the revenues thereof since he has been in possession of the same under the will. By a special agreement the rents and revenues are disconnected from this suit, and the only question before us is, the title to the land.

Plaintiffs contend that inasmuch as the terms of the will were not complied with, and inasmuch as the terms of the will were the conditions of the legacy, the legacy lapses and the property falls into the mass of the succession, to be divided equally among the heirs.

Every one who was in Louisiana at the time knows, that it would have been impossible for any one to have emancipated a slave in September, 1861, and that it would have been equally impossible to have sent one, much less one hundred and ninety-eight to Liberia.

Late in April, 1862, the United States forces took possession of New Orleans and the neighboring country. By a military order, issued in May, 1863, the statute of 1857 was declared never to have been in force during the occupancy of the country by the federal troops, and owners of slaves were authorized to manumit them on presenting a petition to that effect, to any court of record.

In March, 1864, Bradish Johnson filed a petition in which he prayed leave to emancipate the slaves mentioned in his brother's will. The application was granted. The slaves were freed.

It is contended that this proceeding was unnecessary, inasmuch as two months before, General Banks, the then military commander here, had declared all slavery laws null and void. This does not follow, but it is not necessary that the matter should be inquired into.

In the construction and application of testamentary dispositions, the object of the testator is one of the first things to be ascertained. What was the object of George Johnson with regard to the slaves which he owned? Was it to send them to Liberia? In our opinion this was a mere incident to the bequest, and made simply in what he considered might be the interest of those to whom he desired to be bountiful. His main object we think was the emancipation of those whom he had held in bondage and whose labor had contributed to his wealth. His principal end was to make them free; the place where they were to enjoy their freedom was a very secondary consideration. They were freed, and thus his object was accomplished. They were freed also by the act of his legatee, and thus the provisions of his will were carried out. They were not sent to Liberia, it is true, but this is not the fault of the legatee. In this regard he tendered to those who wished to go, the means stipulated in the will, which they declined. Besides, this was a stipulation in their own behalf, and not one in which the heirs have any interest; for it would hardly be contended, we think, that if they could have been emancipated under the laws of Louisiana when they would have been entitled to their freedom under the will, with permission to remain in Louisiana, and they had been emancipated and had refused to go to Liberia, that this portion of the will would have been set aside. The first privilege of freedom is the right to choose a home from out the world; it might have been worse than slavery to them to force them from the place of their birth, to break up their associations and to sunder even such weak ties as were socially known to them, and to drive them across the seas, among strangers, and in a distant land. Being free to go or not to go, was the question which their own choice alone could determine, and whether they went or staid was not a matter in which the heirs of their liberator had any say. It is their ground of action against the legatee to force a compliance with the terms of the will, if they choose to occupy it, but it is no reason why his bequest should be set aside.

Beyond this, all the heirs of George Johnson ratified and confirmed his will, as has been seen; they were recognized and put in possession of their respective shares; his succession has been fully administered, and his executors have been discharged. After all these proceedings,

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and in the face of their solemn acts, the heirs can not, we think, be heard, when they seek to annul the will in any of its parts.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

LUDELING, C. J. In the brief filed in support of the application for a rehearing in this case, it is suggested that Mr. Justice Morgan, who pronounced the judgment of the court, should have recused himself, and reference is made to the statute (Sec. 1922 R. S.), which declares that "whenever, in any case before the Supreme Court, or any other court having appellate jurisdiction, the judgment appealed from shall have been rendered, in the first instance, by any judge of said appellate court, at a time when he was judge of the court of original jurisdiction, it shall be the duty of said judge *ex officio* to recuse himself, without it being necessary that a motion be made to that effect by any of the parties."

The statute has not the remotest bearing in the case before the court.

The judgment appealed from was not rendered by Judge Morgan, but by Judge Cooley, judge of the Sixth District Court, of which Mr. Justice Morgan never was judge. While judge of the Second District Court, Judge Morgan decided a case growing out of the will of George Johnson, but that case was decided by this court years ago, and it is a totally different case from the one now under consideration; the causes of action and the things claimed in the two suits were different.

The other grounds for a rehearing have even less reason to support them than the foregoing, for if it be conceded that the agreement of fifteenth of December, 1857, did not embrace the Louisiana property, still, having decided that the testament was valid and that Bradish Johnson had discharged the obligations imposed on him by the will, it is of no consequence what the said agreement embraced.

The rehearing is therefore refused.

No. 4516.

E. NEWMAN & Co. v. L. H. LEVY.

The defendant's petition of appeal prays that E. Newman & Co. be cited through Raoul Jumonville, liquidator, to answer the appeal, and accordingly citation was only served on Jumonville. E. Newman was not cited, although he had an interest in sustaining the judgment. The fault is imputable to the appellant. Of the court's own motion the appeal is dismissed.

APPEAL from the Sixth District Court, parish of Orleans. Cooley, J., D. C. Labatt, for plaintiffs and appellees. Cotton & Levy, for defendant and appellant.

WYLY, J. In his petition for appeal, the defendant prayed that "E.

Field and Ponder v, Rogers et als.

Newman & Co. be cited through Raoul Jumonville, liquidator, to answer the appeal." And, accordingly, citation was only served on Jumonville. E. Newman was not cited. He had an interest in maintaining the judgment. The fault is imputable to the appellant.

Of our own motion, it is ordered that the appeal herein be dismissed, appellant paying costs.

Rehearing refused.

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118	41
118	43

No. 3011.

A. P. FIELD and JESSE R. PONDER v. W. N. ROGERS et als.

A certain sum was deposited in the hands of Rogers by Mrs. Williams to induce him to sign a bond for the release of her husband, who was prosecuted for the embezzlement of funds belonging to Ponder—which money thus deposited Rogers was to return to her or to her order as soon as he became released from his bond. The prosecution was discontinued, the release from the bond was thereby effected, and an assignment of the funds deposited was made by Mrs. Williams to the plaintiffs, who sued Rogers on his refusal to pay the same.

Such an agreement on the part of the prosecuting witness, one of the plaintiffs, is one which a court of justice should not recognize and enforce. The agreement was that, if the money embezzled should be returned, he would not prosecute the offender. This can not be the basis of an action in a court of justice to compel one of the contracting parties to comply with the contract; and, as set out in the petition, the demand of the counsel of the accused is so connected with this illegal contract, that it can not be granted.

The plaintiffs had a legal remedy by which their civil demand against the defendants could have been enforced. The action here is not against the depositary on the simple assignment of the depositor; for both the depositor and the depositary are sued *in solido*, and the effect of the suit is to enforce the consideration for the discontinuance of the prosecution.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Cotton & Levy, William H. Hunt*, for plaintiffs and appellants. *J. R. Beckwith*, for defendant and appellee.

WYLY, J. John L. Williams was convicted of embezzling four thousand dollars from the plaintiff, Jesse R. Ponder. His attorney, A. P. Field, obtained a new trial and an order for his release on a bond for \$2500. On the sixth May, 1867, he was released on bond, the defendant, William N. Rogers, going security. In order to get Rogers as security on the bond, Mrs. Williams, the wife of the accused, deposited with him as collateral security \$2500 cash. Shortly after his release, Williams left the State, with a view not to appear at the trial and answer to the charge against him. His wife, who remained a few days after he left, was anxious to get the prosecution settled or compromised, Ponder having employed counsel to assist in the prosecution. In order to accomplish the object she was willing to give up the \$2500 deposited by her with Rogers, agreeing that whatever remained after settling with Ponder, A. P. Field might retain for his services. She

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therefore made the following conditional assignment of her funds in the hands of Rogers:

“ NEW ORLEANS, May 14, 1867.

“ Mr. W. N. Rogers, Gravier street:

“ SIR—Upon your release from the bond in the district court, given there by you for the appearance of my husband to stand his trial, you will pay over to Col. A. P. Field the twenty-five hundred dollars given you by me as collateral security should he fail to appear when called on, and this will be your receipt for the same.

“ MRS. C. WILLIAMS.”

Rogers was promptly notified of this assignment. Field subsequently effected a compromise with Ponder, agreeing to pay him out of said fund fifteen hundred dollars, and the prosecution was discontinued by the State. Rogers, however, refused to pay over the money, and on August 22, 1867, Field and Ponder brought this suit against him and also Williams and wife. Rogers alone was cited, and for answer pleaded the general issue. Williams and his wife having left the State could not be cited. They are, therefore, not before the court. There was judgment in the court below dismissing their demand as of nonsuit, and the plaintiffs have appealed.

From the evidence we are satisfied that Rogers had the twenty-five hundred dollars belonging to Mrs. Williams on deposit at the time he was notified of the conditional assignment of May 14, 1867; and from that moment the funds belonged to the plaintiffs, subject to the condition expressed in said assignment. *Edwards v. Daley*, 14 An. 384; *Marshall v. Morehouse*, 14 An. 690; *Ayles v. Hawley*, 9 An. 362. Therefore on the eleventh July, 1867, when the prosecution against Williams was discontinued, by reason of the compromise with Ponder, Rogers should have delivered the twenty-five hundred dollars to the plaintiffs because the condition, mentioned in the assignment, had happened, he was released from the bond by the discontinuance of the suit.

If Rogers parted with any portion of the funds deposited with him, after notice of the assignment, he did so at his peril. Whether the compromise with Ponder was the compounding of a felony or not, does not concern the defendant, Rogers, who is a mere stakeholder or depositary. Besides, the plea of immorality and other special defenses set up in the brief can not be noticed, the general denial being the only defense he saw fit to plead. Rogers could not, in his pleadings, set up defenses which belong to Williams and his wife; and for a greater reason he can not be heard suggesting them in his behalf.

It is therefore ordered that the judgment herein be annulled, and it is now ordered that the plaintiffs recover of the defendant, William N. Rogers, twenty-five hundred dollars, with five per cent. interest thereon from August 24, 1867, and costs of both courts.

ON REHEARING.

HOWELL, J. The plaintiffs allege that John L. Williams and his wife, C. Williams, and William N. Rogers are indebted to them, *in solido*, in the sum of \$2500, because that said John L. Williams received from the plaintiff, Jesse R. Ponder, of Texas, the sum of \$4000, and embezzled the same; that the said Mrs. C. Williams, with the consent of her husband, placed \$2500, community property, in the charge of the said Rogers to be returned to Williams or his wife, when he, Rogers, became discharged on the bond of said Williams to appear and stand trial; that Mrs. Williams, with the knowledge of her husband, and in order to defray expenses of defense, etc., placed the whole of said sum at the disposition of plaintiff, Field, and authorized him to collect and pay all the professional services due, and to pay the plaintiff, Ponder, a portion of the sum of \$4000, to wit, \$1500; that Rogers received a note to this effect from Mrs. C. Williams, and then agreed to pay the same to said Field, knowing that said note was a transfer from said Williams and wife; that Rogers treated said money as the money of Field, and bound himself to pay his acceptance; that on one occasion he claimed an indemnity of \$250 out of said amount; that he now fraudulently retains the same, notwithstanding his said agreement after the service of the notice and before and after his discharge from the bond; and they prayed that all the defendants be cited and condemned *in solido* to pay them \$2500 and interest from judicial demand.

J. L. Williams and wife having left the State were not cited, but a general denial was filed in behalf of the defendants, and afterward an amended answer or peremptory exception by Rogers, setting up, among other matters, the inability of the wife to assign community property. There was judgment against the plaintiffs as of nonsuit, and they appealed.

The main facts are that John L. Williams was found guilty of embezzling \$4000 belonging to plaintiff Ponder, and upon application of his counsel, A. P. Field, obtained a new trial, and was released from custody upon bond for \$2500, signed by William N. Rogers as security, with whom Mrs. C. Williams, the wife, had deposited the sum of \$2500 as collateral. Ponder, the prosecuting witness, and Williams, the accused, left the State. Mrs. Williams, on fourteenth May, 1867, gave to Field the following:

“Mr. W. N. Rogers:

“SIR—Upon your release from the bond in the district court, given there by you for the appearance of my husband to stand his trial, you will pay to Colonel A. P. Field the twenty-five hundred dollars given you by me as collateral security should he fail to appear when called on, and this will be your receipt for the same,

“MRS. C. WILLIAMS.”

This was presented to Rogers by a witness, who says Rogers accepted it verbally.

On the same day Rogers was called on for a receipt in favor of Mrs. Williams, and he gave the following (in pencil):

"MRS. WILLIAMS—I do not think I am safe in giving a receipt.

"Yours, respectfully,

W. N. ROGERS.

"New Orleans, May 14.

"You will find me all right when the thing is settled."

After some consultation between the counsel of Ponder and Williams, Ponder was written to and he answered as follows:

"MILLICAN, Texas, May 31, 1867.

"L. C. Levy, Esq., New Orleans:

"DEAR SIR—Yours of twenty-seventh instant is to hand and contents noted. Having left the Williams matter entirely to you, I hope you will continue it to the best advantage possible. Inclosed I hand the letter you requested me to write C. H. Luzenberg, Esq., but wish you to secure, before presenting it, the best compromise possible.

"Hoping to hear from you soon, I am very respectfully,

"J. R. PONDER."

The letter referred to reads:

"MILLICAN, Texas, May 31, 1867.

"C. H. Luzenberg, Esq., District Attorney, Parish of Orleans, La:

"DEAR SIR—I will not prosecute John L. Williams further, his friends having proposed to pay back to me a portion of the money I charge him to have embezzled, and I will wait until he can arrange the balance of the amount. I therefore request that you enter *nolle prosequi*, as my testimony alone can convict him, and I will not be in your city again during the year.

"Your obedient servant,

"JESSE R. PONDER."

On producing this in court, the district attorney entered a *nolle prosequi* on eleventh July, 1867, and Williams was discharged from his bond.

We are of opinion that the foregoing shows such an agreement on the part of the prosecuting witness, one of the plaintiffs, as a court of justice should not recognize and enforce. The agreement was that if the money embezzled should be returned, he would not prosecute the offender. This can not be the basis of an action in a court of justice to compel any of the contracting parties to comply; and as set out in the petition, the demand of the counsel of the accused is so connected with this illegal contract that it can not be granted.

The plaintiffs had a legal remedy by which their civil demand against the defendants could have been enforced. The action here is not against the depository on the simple assignment of the depositor, for both the

depositors and depositary are sued *in solido*, and the effect of the suit is to enforce the consideration for the discontinuance of the prosecution of Williams.

It is therefore ordered that our former decree be set aside, and that the judgment appealed from be affirmed.

WYLY, J., *dissenting*. Mrs. Williams deposited with Rogers, the only party defendant before the court, twenty-five hundred dollars, to indemnify him from loss in being security on the bond of her husband to appear and answer to the charge of embezzlement. Rogers, the depositary, incurred thereby the legal obligation to return the money deposited to Mrs. Williams, or to pay it on her order, as soon as he became released from the bond. Mrs. Williams subsequently made a conditional assignment of the money to the plaintiff, A. P. Field, of which Rogers was duly notified and assented thereto. And this condition was the release of the bond which Rogers had signed. The condition happened. The assignment or order of Mrs. Williams on Rogers for the money became absolute. Rogers refused to pay over the money, and this suit against him is the result. The basis of the action against him is the obligation he incurred when he received the money deposited by Mrs. Williams. The obligation of a depositary is the obligation sought to be enforced against him.

There is nothing immoral in Rogers being compelled to pay over to A. P. Field, assignee of Mrs. Williams, money which Mrs. Williams deposited with him as an indemnity against liability on the bond which he signed as security for her husband, that bond being discharged by the discontinuance of the suit or criminal prosecution. Now, whether this discontinuance resulted from the compounding of a felony, or any other immoral transaction, is of no consequence so far as Rogers is concerned.

What means were employed to obtain the release of the bond does not concern him. It was no part of his agreement when receiving the deposit that he should keep the money unless the bond was released in a legitimate manner. He had nothing to do with the means employed to accomplish the release of the bond. It was enough for him to know that the bond was canceled, and his obligation to pay over the money to Mrs. Williams, or the plaintiff holding her order, became absolute. What consideration Field gave to get the assignment or order for the money does not concern Rogers, the depositary. It is no excuse for him that the consideration for the order or the assignment by Mrs. Williams was immoral, or that she gave the order as the consideration for the discontinuance of a criminal prosecution. If Mrs.

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Williams had appeared and set up the illegality of the consideration for the assignment or order in favor of Field, the question would have been properly before the court. If the defendant is compelled to pay over the money on the order of Mrs. Williams, the obligation he will discharge in doing so will be the obligation of a depositary, the only one he incurred, and that surely was not immoral.

It has frequently been held by this court that the holder of a note given for a valid consideration can enforce its payment whether the consideration he gave for it to the indorser was a slave, or Confederate money, or not; whether the consideration for the indorsement was immoral or not.

For the reason stated and those expressed in the first opinion of this court in this case, I dissent.

No. 5115.

STATE OF LOUISIANA v. HAMILTON MILLER.

Neither injury nor fraud having been alleged or shown, resulting from the venire, or drawing of the jury, or from any other irregularity on the trial of the defendant, no relief can be obtained by him under the ninth section of the act No. 94 of the acts of 1873, entitled "an act relative to juries," etc.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J.* Criminal case. *Hiram R. Steele*, District Attorney, *Henry C. Dibble*, Assistant Attorney General, for the State. *Thos. P. Farrar*, for defendant and appellant.

LUDELING, C. J. The defendant was indicted for murder and convicted without capital punishment. From the judgment sentencing him to the penitentiary for life, he has appealed.

On the first day of the term of the court at which he was tried, the accused challenged the array of jurors, on the grounds that the venire was drawn under the provisions of the act of 1873, which does not apply to the parish of Tensas, in which the registration of voters was attainable. And after his conviction, he moved in arrest of judgment on the grounds that the grand jury had been illegally impaneled, for the reasons above stated.

In this court he has assigned as errors that the act of 1873 is unconstitutional, as it does not state that its provisions are not applicable to the parishes in which lists of the registered voters existed, and that the juries were illegally impaneled.

There is no force in the objection relating to the title of the act which does indicate the subjects embraced in the act.

The ninth section of said act of 1873 declares, that it shall not be sufficient cause to challenge the whole array or to set aside the venire

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because some of the jurors drawn are not qualified jurors, etc., "nor because of any other defect or irregularity than in the manner of drawing the juries as above provided, and no such defect or irregularity in the drawing thereof shall be sufficient cause if it shall appear that the objection is merely technical and it shall not appear some fraud has been practiced or some great wrong committed in the drawing or summoning of the jury that would work a great or irreparable injury." Acts of 1873, p. 168.

Neither injury nor fraud was alleged or shown. The rulings of the judge *a quo* was therefore correct.

It is ordered that the judgment be affirmed with costs of appeal.

No. 3476.

P. LYONS, Tutor, v. J. C. DOBBINS.

In this case, two lots with buildings thereon were owned and held in common by two different persons, and, at the partition, nothing being said as to the dividing line, the parties (one of whom a minor whose tutor the plaintiff is) must have considered the limits to be defined by the buildings on each, which constituted a double cottage, and this state of things continued, without complaint, for about three years thereafter, when the plaintiff assumed to establish a line for himself without notice to his neighbor aforesaid, by tearing down a portion of the buildings which he alleged to extend over the minor's lot some nine feet, and took an injunction to prevent defendant's interference. The evidence does not sustain the injunction, and defendant claims damages. It is not thought, however, that the minor should be responsible for the illegal acts of his tutor. In such capacity he could have protected and exercised the rights of the minor in a legal manner. As the plaintiff is not before this court individually, all that can be done is to dissolve the injunction, reserving defendant's rights.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. O. T. & E. J. Fellowes*, for plaintiff and appellee. *T. Gilmore & Sons*, for defendant and appellant.

HOWELL, J. One P. Ryan and the minor child of the plaintiff were the owners in common of two adjoining lots. By an act of partition in kind, lot A fell to Ryan and lot B to the minor. Each lot was described in said act as being equal in measurement, and a double cottage stood on the two. Ryan sold to the defendant, and the owners were in possession, each side of the cottage being occupied by them respectively or their tenants.

Some three years after the partition the plaintiff, as tutor, instituted this suit to enjoin the defendant from interfering with him in the removal of a part of a building which he alleges extends on his lot some nine feet. After the issuance of the injunction the plaintiff caused a portion of the tenement, occupied by defendant's tenant, to be cut down and removed, for which the defendant claims damages in an amended answer.

The evidence does not sustain the injunction. There was no attempt on the part of the plaintiff to have the line between the lots definitely fixed by a regular survey, if there was uncertainty as to its location, and under the doctrine in *Riddell v. Jackson*, 14 An. 135, the partition wall between the two tenements must, in such case, control and determine the limits of the adjoining properties.

In this case the two lots were owned and held in common, and at the partition, nothing being said as to the dividing line or the position of the tenements, the parties must have considered the limits to be defined by the buildings on each; and this state of things continued without complaint for about three years thereafter, before plaintiff assumed to establish a line for himself without notice to his neighbor. We do not think, however, the minor should be held responsible for the illegal acts of his tutor. In such capacity he could have protected and exercised the rights of the minor in a legal manner. As he is not before us individually, we can only dissolve the injunction, reserving defendant's rights.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be dissolved, with costs in both courts, reserving to defendant his right, if any he have, to damages.

Rehearing refused.

No. 3335.

A. ROCHEREAU & Co., Agents, v. MRS. BERTHA LEWIS and HUSBAND.

Where the suit is brought to recover from defendants the amount of five notes given by them in payment of the lease of certain property and where, when the suit was instituted, there was already an action pending in another court, between these defendants and plaintiffs, to annul said lease and cancel said notes, the plea of *lis pendens* is a good one and should have been maintained.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. *John H. Isley*, *E. Bermudez*, for plaintiffs and appellees. *B. R. Forman*, for defendants and appellants.

MORGAN, J. Plaintiffs sue to recover from the defendant \$1000, amount of five notes for \$200 each, given by them in payment of a lease of certain property. They excepted, first, that plaintiffs had shown no authority to represent their alleged constituents; and second, *lis pendens*.

First—In the contract of lease they recognized the plaintiffs' representative capacity. They can not now be allowed to question it.

Second—In May, 1870, the defendants instituted suit against the plaintiffs in the Sixth District Court to annul the lease which had been entered into between them, and to cancel the notes which they had

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given therefor, the notes being the same upon which this suit is instituted. This suit was pending when the one now before us was instituted. The plea was a good one and should have been maintained. See *Bischoff v. Theurer*, 8 An. p. 15.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed; that the exception of *lis pendens* be sustained and the suit dismissed, plaintiffs to pay the costs in both courts.

No. 4843.

STATE OF LOUISIANA v. E. A. GIROUX and C. GIROUX.

The refusal of the judge to order the separation of the witnesses is a matter within his sound discretion.

The judge *a quo* was correct in refusing to charge that, "if from the nature of the assault, Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife and was at the time of the killing being inflicted upon her person, then the killing was done in self defense." This would have required the judge to assume the fact that the assault upon his wife was without provocation, for if the wife was the aggressor, the killing would not be excusable in self defense.

The judge *a quo* did not err when he refused to charge the jury, "that they must take into consideration the crippled condition of the accused." The cripple was not assaulted, and his being a cripple did not give him any greater right to kill one who assaulted his wife, than other men possess.

There was no error in the charge of the judge *a quo* that the principle decided in the case of *Selfridge* by the Supreme Court, "was the law of Louisiana, whenever there is any application to the case."

The judge *a quo* correctly refused to charge, in regard to the dying declarations of the deceased, "that the statement must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented from any cause from making, they will not be received." The defendant's counsel did not object to the admission of said declarations, but on the contrary used them, and referred to them as evidence in the argument before the jury.

A PPEAL from the First District Court, parish of Orleans. *Abell*, J. Criminal case. *A. P. Field*, Attorney General, for the State. *H. O. & J. H. Castellanos*, for E. A. Giroux, defendant and appellant.

LUDELING, C. J. The defendant, E. A. Giroux, having been found guilty of murder, without capital punishment, has appealed.

Besides the questions presented by the bills of exceptions, the defendant urges the following objections: that there is no record of the names of the grand jury, nor does it appear that twelve of said jurors concurred in finding the indictment. These objections are not tenable. See *State v. Kennedy*, 8 Rob. 591; 12 An. 862; and *State v. Thomas*, 25 An.; *Ray's Revised Statutes*, p. 196, sec. 992.

The first bill of exceptions was to the appearance of George H. Braughn, Esq., to represent the State. He exhibited his authority and

under the law of this State was properly allowed to represent the State. See *State v. Donnelly*, 25 An.

The next bill was to the refusal of the judge to order the separation of the witnesses. This was a matter within the sound discretion of the judge *a quo*. 1 Greenl. Ev. p. 479 and 432.

The next exception was to the ruling of the judge refusing to charge the jury, "that if from the nature of the assault Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife, and was at the time of the killing being inflicted upon her person, then the killing was done in self defense." This would have required the judge to assume the fact that the assault upon the wife was without provocation, for, if the wife was the aggressor, the killing would not be excusable in self defense. American Crim. Law by Wharton 4 Rev. Edition, p. 1020, and authorities cited in note. The charge as modified by the court was perhaps more favorable to the prisoner than was authorized by the law. The next exception was to the refusal of the judge to charge the jury that they must take into consideration the crippled condition of the accused. The cripple was not assaulted, and his being a cripple did not give him any greater right to kill one who assaulted his wife, than other men possess. The next bill refers to the law of self defense. The counsel for the prisoner asked the judge to charge the jury "that the doctrine laid down in the case of *Selfridge* was the law of Louisiana and had been affirmed by the Supreme Court." The charge given was—"it is, whenever there is any application to the case." The charge was substantially correct. The judge did not think the principle decided in that case applicable to the case at bar, and while stating that the doctrine enunciated in that case had been approved by the Supreme Court of this State, he did not see that the principle was applicable in this case. We concur with him.

The next and last bill is to the refusal of the judge to charge in regard to the dying declarations of the deceased, "that the statement must be complete in itself, for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received." The judge refused to give this charge on the ground that the defendant's counsel did not object to the admission of said declarations, but on the contrary, used and referred to them as evidence in the argument before the jury. The judge did not err.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs.

No. 5128.

E. ROCHEREAU & Co., in liquidation, v. D. H. DELACROIX. On third opposition of Mrs. **STEPHANIE DE LIVAUDAIS**, wife of D. H. DELACROIX.

The court below did not err in refusing the intervenor the preference which she asserts, because her legal mortgage was not duly recorded in the mortgage office prior to the first of January, 1870. It was recorded in December, 1869, in the book of donations only.

The fact that in the month of March, 1871, the book of donations was closed, and the same book was used thereafter as a mortgage book, can not benefit the intervenor, whose mortgage had already perished for want of registry in the mortgage book.

That the plaintiffs had knowledge of the intervenor's tacit mortgage is of no consequence. Under numerous decisions of this court knowledge is not equivalent to registry.

Article 123 of the State constitution does not impair the obligations of contract, and is not violative of the constitution of the United States.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. E. Bermudez*, for plaintiff and appellee. *Tissot*, for third opponent and appellant.

WYLY, J. This is a controversy between the plaintiffs, who are conventional mortgage creditors of the defendant, and the intervenor, the wife of the defendant, who sets up her legal mortgage, in regard to the proceeds of the sale of certain property of the defendant under the foreclosure of plaintiff's mortgage.

We think the court did not err in refusing the intervenor the preference which she asserts; because her legal mortgage was not duly recorded in the mortgage office prior to the first January, 1870. It was recorded in December, 1869, in the book of donations only.

The fact that in the month of March, 1871, the book of donations was closed and the same book was used thereafter as a mortgage book, can not benefit the intervenor, whose mortgage had already perished for want of registry in the mortgage book.

That the plaintiffs had knowledge of the intervenor's tacit mortgage is of no consequence.

Under numerous decisions of this court knowledge is not equivalent to registry. 21 An. 425; 22 An. 402; 23 An. 533; 24 An. 78.

Besides, article 123 of the constitution expressly declares that all tacit mortgages shall cease to have effect against third persons after the first of January, 1870, unless duly recorded.

The intervenor, however, contends that article 123 of the constitution, impairing her tacit mortgage, violates the obligation of a contract in contravention of section 10, article 1 of the constitution of the United States, and is therefore void.

In the succession of Nelson, 24 An. 25, the precise question was decided by this court, adversely to the view taken by the intervenor; and we see no reason to change our opinion on the subject.

It is therefore ordered that the judgment herein against the intervenor and in favor of the plaintiffs be affirmed with costs. 20 An. 571.

Mrs. C. Pickens v. Friend.

No. 5174.

MRS. C. PICKENS, Administratrix, v. THOMAS FRIEND.

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Where the settlement alleged by the plaintiff to have taken place in relation to partnership business, was shown by an instrument signed by the plaintiff and defendant and attested by one witness, and when, on the trial of the cause, the defendant offered to prove by the witness that this instrument was only a statement of the account of the partnership; and that, at the time of signing the same, the plaintiff was, otherwise and besides, largely indebted to him—which indebtedness was acknowledged by the plaintiff;

Held—That the objection to the introduction of such evidence was properly sustained. The written act bound the parties and must speak for itself. The purpose for which the testimony was sought to be introduced seems to be vague. If the object of the defendant was to show that the succession of which plaintiff is the administratrix, owed him more on account of the partnership than the stated account shows, it was clearly inadmissible; if to show that the administratrix individually owed him, it was irrelevant.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. T. A. Bartlette*, for plaintiff and appellee. *Finney & Boland*, for defendant and appellant.

TALIAFERRO, J. The plaintiff enjoins an order of seizure and sale, taken out by the defendant, on the ground that the defendant in injunction, claiming to be subrogated to the rights of a mortgage creditor of her late husband, James A. Pickens, paid the debt to which he claims to be subrogated, out of funds belonging to a partnership that existed between the defendant and James A. Pickens, of whose succession she is administratrix. She avers that, by the defendant's account or exhibit to her of the partnership transactions, and upon which she made a settlement with him, he credits himself with the amount of the mortgage debt of James A. Pickens, which he paid to the creditor, and that there remains due him by the succession only the sum of \$402 70. She alleges further that garnishment process has been taken against the defendant by certain creditors of his, and this balance due him seized in her hands. She prays that the settlement stated by her to have been made with the defendant be recognized as fixing the balance due on the mortgage debt purchased by the defendant; and that upon payment of that balance (\$402 70), there be judgment decreeing the said mortgage debt and judgment rendered upon it satisfied; that no proceedings be had against her until she be released from the garnishment; and if not released that the judgment be decreed satisfied upon payment by her of the said balance of \$402 70).

The defendant admits that he was in partnership with James A. Pickens, in a contract with the North Louisiana and Texas Railroad, to do certain work for the company; that after the death of his partner he received the amount due the partnership for the work. He avers that he advanced the capital and means required for carrying on the business, and besides advanced several sums of money for the separate use and benefit of James A. Pickens; that the succession of Pickens

Mrs. C. Pickens v. Friend.

was indebted to him in the sum of \$2826 with interest; that the settlement referred to by the plaintiff was simply a statement of the condition of the partnership affairs, and had no reference to the various debts due him by the succession. He alleges the nullity of the judgment under which garnishment process issued against the plaintiff and prays a dissolution of the injunction with damages.

There was judgment in the court below in favor of the plaintiff, and the defendant appeals.

The settlement alleged by the plaintiff to have taken place in relation to the partnership business is shown by an instrument signed by the plaintiff and defendant, and attested by one witness. On trial of the cause the defendant offered to prove by the witness that this instrument was only a statement of the account of the partnership, and at the time of signing the same the plaintiff was, otherwise and besides, largely indebted to him, which indebtedness was acknowledged by the plaintiff. Objection being made to the introduction of this proof on the ground that the written act bound the parties and must speak for itself, and the objection being sustained, the defendant reserved a bill of exceptions.

It appears to us the ruling of the court was correct. The purpose for which the testimony was sought to be introduced seems to be vague. If the object was to show that the succession owed him more on account of the partnership than his stated account shows, it was clearly inadmissible; if to show that the administratrix individually owed him, it was irrelevant.

We are unable to find that the defendant has made good the allegations of his answer, and conclude that the judgment of the lower court should remain undisturbed.

Judgment affirmed.

Rehearing refused.

Wilson v. Benjamin et als.

No. 80.

MILTON WILSON v. J. P. BENJAMIN et als.*

The exception to the jurisdiction of the court of Concordia came too late after issue joined.

It should have been made *in limine litis*.

At a public sale made for the purpose of partition, the plaintiff, a possessor in bad faith, became the adjudicatee of two tracts, including the very land which he had possessed during twenty years, and which he had highly improved by clearing and otherwise.

Although the plaintiff has not been actually dispossessed, yet, as a question of law, such has been the effect of the sale and adjudication. In matter of eviction it is a well settled doctrine that actual dispossession is not always required. A purchaser may be evicted, although he continues in possession of the property, if that possession be under a different title, as for instance, if the vendee should subsequently hold under the true owner.

The same principle may be laid down with regard to the possessor in good or bad faith, whose works and constructions have been kept by the owner of the soil. Whether the latter appropriates them to his own individual use, or alienates them to the person to whom he owes the reimbursement, or to any one else, the case is the same. In the first and third hypothesis he retains or transfers that which is but conditionally his property; and, in the second, he transfers to the owner his own property; in the latter, the obligation to reimburse or refund can not be doubted.

The obligation of the defendants in this case is to pay the value of the materials and the price of the workmanship, without regard to the increase or decrease in the value of the soil. As the buildings were the plaintiff's property, the defendants' claim for their rent is unfounded.

The defendants' other claim for the rent of the land is also unfounded. The case is not one of letting and hiring. The claim is one in the nature of damages for the wrongful detention of property; and, although the trespasser is not allowed to prefer a claim for the enhanced value of the soil, attributable to his improvements, yet in the admeasurement of damages, to which he is subject, the benefit derived from such improvements becomes an important element.

The defendants, Wright, Williams & Co., contend that, previously to the partition sale, they had parted with their interest in these lands. The answer to this is, that the partition suit was carried in their own name and for their individual benefit.

A PPEAL from the Ninth Judicial District Court, parish of Concordia. *Haralson, J.* Jury trial. *A. N. Ogden* and *W. B. Spencer*, for plaintiff and appellant. *W. H. Hunt*, for the testamentary executors of *James D. Denegre*. *H. B. Shaw, York & Sawyer, Benjamin, Bonford & Finney*, for defendants and appellees.

VOORHIES, J. The plaintiff's action arises under the provisions of article 5'0 of the Civil Code. He claims to be reimbursed for the value of "plantations, constructions and works," which he alleges to have made on the defendants' property.

First—The exception of Wright, Williams & Co. to the jurisdiction of the court of Concordia came too late after issue joined; it should have been filed *in limine litis*. C. P. 333; Acts 1839 p. 172, § 23.

Second—The plaintiff settled upon the land, from which he has been evicted, some time in the year 1835. His object was to acquire a pre-emption right; but it does not appear from the record that he ever took the necessary steps. For the space of twenty years, running from

*This case was decided in May, 1861, rehearing was granted, and in May, 1870, the final opinion of the court was recorded. Having been lately sent to the Reporter, it appears in this volume.

26	587
51	1707
26	587
113	342

26	587
123	25

Wilson v. Benjamin et als.

the date of his possession, he had no just reason to believe himself the master of this property; and he well knew that he had no title. He was, therefore, a possessor in bad faith. C. C. 495, 3414, 3415.

In the meantime a suit was pending between the United States government and Curry & Garland, who claimed, as transferees of L. Bringier, the Bringier grant, in which was included the tract of land occupied by the plaintiff. Upon the final termination of this suit adversely to the government, the parties in interest proceeded to make a judicial partition of the property in question. At the public sale made for that purpose, the plaintiff became the adjudicatee of two tracts, including the very land which he had possessed during twenty years, and which he had highly improved by clearing and otherwise. Although the plaintiff has not been actually dispossessed, yet, as a question of law, such has been the effect of the sale and adjudication. In matter of eviction it is well settled doctrine that actual dispossession is not always required. A purchaser may be evicted although he continues in possession of the property, if that possession be under a different title; as, for instance, if the vendee should subsequently hold under the true owner. Eviction, as defined by the Code, "is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person." C. C. 2476; 15 An. 514, suc. of D. W. Coxe. The same principle may be laid down with regard to the possessor in good or bad faith, whose works and constructions have been kept by the owner of the soil. Whether the latter appropriates them to his own individual use, or alienates them to the person to whom he owes the reimbursement, or to any one else, the case is the same. In the first and third hypothesis he retains or transfers that which is but conditionally his property; and, in the second, he transfers to the owner his own property. In the latter, the obligation to reimburse or refund can not be doubted. "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." C. C. 2279.

The obligation of the defendants is to pay the value of the materials and the price of the workmanship, without regard to the increase or decrease in the value of the soil. C. C. 500; Dearmand v. Pullen, 16 An. (not reported). The value of the buildings, adopting the lowest estimates, amounts to the sum of \$3770. As these buildings were the plaintiff's property the defendants' claim for their rent in the sum of \$4800, is unfounded.

The defendants set up another claim of \$10,560 for the rent of the land; but as there was, previously to the sale in 1855, no privity of contract between them and the plaintiff, the case is not one of letting

Wilson v. Benjamin et als.

and hiring. C. C. 2639. The claim is one in the nature of damages for the wrongful detention of property; and, although the trespasser is not allowed to prefer a claim for the enhanced value of the soil, attributable to his improvements, yet, in the admeasurement of damages to which he is subject, the benefit derived from such improvements becomes an important element. The improvements, such as clearing a portion of the land, the whole of which was at the time a forest, and putting it in a high state of cultivation, were worth, independently of the buildings and constructions, fully the amount at which the detention of the property might be appraised.

Third—The defendants, Wright, Williams & Co., contend that, previously to the partition sale, they had parted with their interest in these lands. The answer to this is that the partition suit was carried on in their own name and for their individual benefit.

It is therefore ordered and decreed that the judgment of the district court be avoided and reversed, and that the plaintiff do recover the sum of three thousand seven hundred and seventy dollars from the defendants, in the proportion of their respective shares, as fixed by the partition of the proceeds of the sale of the Bringier lands, made by order of court in the case of W. C. Micon v. D. S. Stacy et als. It is further ordered that the plaintiff do recover, on this amount, interest at the rate of five per cent. per annum from judicial demand, and costs in both courts. It is further ordered that the defendants' reconventional demand be rejected, at their costs.

LAND, J., absent, concurring.

ON REHEARING.

TALIAFERRO, J. After a careful review of this case, we find no reason for altering the decree rendered by our predecessors on the twenty-seventh May, 1861.

It is therefore ordered that the judgment remain unchanged.

Mr. Justice HOWE recused.

26 590
125 702

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
OPELOUSAS.

JUNE, 1874,

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO, HON. R. K. HOWELL, HON. W. G. WYLY, HON. P. H. MORGAN.	}	<i>Associate Justices.</i>
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No. 853.

SUCCESSION OF ALEXANDER McDONALD.

It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

APPEAL from the Parish Court, parish of Vermilion. *Guegnon, J. F. R. King*, for administrator and appellee. *R. S. Perry*, for opponents and appellants.

WYLY, J. We do not find the transcript incomplete and the clerk's certificate insufficient. Therefore the motion to dismiss the appeal on account thereof is denied. This is an appeal from the judgment dismissing the opposition of Ann McDonald, wife of John Stafford, to the account and supplemental account of the administrator of the succession of Alexander McDonald, on the ground that she was not authorized by her husband.

She alleged in her petitions of opposition that she was authorized, subsequently, and before trial on the merits, John Stafford filed an opposition himself in which he averred that he authorized the suits of his wife. It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

It is therefore ordered that the judgment appealed from be annulled and it is now ordered that this cause be remanded in order that the opposition herein may be tried and this litigation be proceeded in according to law, appellee paying costs of appeal.

Cross v. Parent.

No. 849.

J. P. CROSS v. F. P. PARENT. E. PARENT and B. J. WEST,
Intervenors.

26	591
108	207

In the intervention of West, the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the district court was without jurisdiction *ratione materiae*. If the property he claimed belonged to him, he should have sued for it in a court of competent jurisdiction.

A PPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. R. S. Perry and J. Robertson*, for plaintiff and appellant *W. F. Schwing*, for West, intervenor. *J. A. Breaux*, for defendant and appellee.

WYLY, J. The plaintiff sued the defendant for \$1368 59, and attached a stock of goods in a store in the town of Iberia.

Edward Parent intervened, claiming to be the owner of the property attached under a notarial act of sale from his brother, the defendant, of date March 2, 1871. He was also permitted to release the attachment on bond.

Subsequently B. J. West intervened, claiming to be the owner of part of the merchandise attached, of the value of three hundred and five dollars.

The court gave judgment for West for the restoration of the goods claimed by him; gave judgment for the plaintiff for the sum claimed of the defendant, but set aside the attachment on the ground that the sale to the intervenor, E. Parent, was not a simulation, reserving the right of plaintiff to attack it in a direct action.

From this judgment the plaintiff appeals.

The important question is, was the sale from the defendant to his brother, E. Parent, a simulation?

The defendant and this intervenor are the only witnesses testifying as to the verity of the sale. They say the price was \$2000; \$600 cash, and \$1400, the sum the defendant was owing the intervenor for fourteen months salary as clerk preceding the sale. The statement of these witnesses is highly improbable in view of the evidence of the plaintiff and other witnesses.

Three disinterested witnesses testify that the intervenor, quite a youth, only came from Havana some two or three months before the pretended sale, and that he was without sufficient means to pay his passage and other expenses, money for that purpose having been advanced at the request of the defendant.

If he only came from Havana to live with his brother two or three months before the sale, it is impossible for the statement of the Parent brothers to be true, that the defendant was owing \$1400 for fourteen months salary to the intervenor as clerk in the store previous to the

sale. It is highly improbable that the defendant with a store worth only \$2000 would give his young brother, a stranger in the neighborhood, a salary of one hundred dollars per month to clerk for him, and that for fourteen months this young man, without money to pay his passage from Havana, was able to live without touching a dollar of his salary. When the attachment was levied the sign of the defendant was over the store, and the sheriff swears he was in possession.

In view of the evident untruthfulness of the witnesses supporting the sale in regard to the fourteen months salary preceding it, we must regard their evidence as to the payment of the six hundred dollars as also untrue. Our conclusion is that the sale was a simulation.

In regard to the intervention of West, we will remark that the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the court was without jurisdiction *ratione materiæ*. If the property belonged to him he should have claimed it in a court of competent jurisdiction.

The attachment should have been maintained and the intervenors dismissed.

It is therefore ordered that the judgment herein be amended so as to recognize the plaintiff's privilege on the property attached, and to dismiss the intervenors with costs of their interventions, and as thus amended it is ordered that the judgment be affirmed, appellees paying costs of appeal.

No. 840.

JOHN I. ADAMS & CO. v. SAMUEL WAKEFIELD, Tax Collector.

While the property seized for taxes, and the sale of which is enjoined, belonged to the former proprietor, W. J. Darden, no registry was necessary to preserve the privilege of the State for taxes due by him. But when the plaintiffs bought the property in 1872, it passed to them free of the privilege for taxes for the preceding years, because there was no registry of those tax claims. The subsequent registry could not fix on the purchasers an incumbrance which did not exist as to third persons, when the plaintiffs acquired the property.

A PPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. Fred. Gates*, for plaintiffs and appellants. *R. L. Belden*, District Attorney, for defendant and appellee.

WYLY, J. John I. Adams & Co., mortgage creditors of William J. Darden, foreclosed their mortgage, and on sixth April, 1873, purchased the land described in the petition, there being only \$71 50 recorded as a privilege for taxes, which they paid. Subsequently the taxes of Darden for the years 1868, 1869, 1870 and 1871, amounting in the aggregate to \$795 50, were recorded, and the tax collector seized the land purchased by John I. Adams & Co. The plaintiffs then sued out an in-

 Adams & Co. v. Wakefield.

junction to restrain the sale. The court dissolved the injunction with one hundred per cent. damages and costs. The plaintiffs appeal.

While the property belonged to Darden, no registry was necessary to preserve the privilege of the State for taxes. But when the plaintiffs bought it, the property passed to them free of the privilege for taxes for the years 1868, 1869, 1870 and 1871, because there was no registry of the tax claims. The subsequent registry could not fix an incumbrance which did not exist as to third persons when plaintiffs acquired the property.

It is therefore ordered that the judgment herein be annulled, and it is now ordered that there be judgment for the plaintiffs perpetuating the injunction with costs.

 No. 851.

MARIE ELODIE PERRET, wife, etc. v. BERNARD SANARENS and
SHERIFF.

The plaintiff having a legal mortgage on a certain piece of land at the time of its being given to her by her husband, in payment of a valid debt which he owed to her, took said land free from defendant's mortgage which was junior to her's, and which she could have disregarded in enforcing her rights, by the sale of said property, without giving good cause of complaint to said junior mortgagee.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Edward Simon*, for plaintiff and appellant. *A. C. Dumartrait*, for defendant and appellee.

LUDELING, C. J. In 1857, the plaintiff received by donation from her mother, \$3400 in cash. The plaintiff's father testified that this money was paid or delivered to her husband, Charles Armelin.

In 1866, to reimburse his wife this sum of money, he made a *dation en paiement* to his wife by notarial act in due form, and she was put in possession of the real and personal property, appraised by two appraisers at \$3267.

Subsequently, she sold portions of the real estate to different persons. In 1871, B. Sanarens, who had had a mortgage on the real estate, executed by the husband, Charles Armelin, in 1866, caused the said lands to be seized and advertised for sale under his mortgage, proceeding against M. E. Perret and her vendees as third possessors of the mortgage property. Mrs. Armelin, née Perret, enjoined the sale.

There was judgment dissolving the injunction with damages and the plaintiff has appealed.

The facts already stated show that the plaintiff had a valid debt against her husband for \$3400, and that he transferred to her, by notarial act, property worth less than her debt, in satisfaction or extinc-

Marie Elodie Perret v. Sanarens and Sheriff.

tion thereof. At the date of said transfer, her legal mortgage existed on the land and she might have enforced it by the sale of the property, without any reference to the mortgage of Sanarens, which was junior to hers. So she could take the property in payment of her debt, without giving cause of complaint to the junior mortgagee. C. C. 2421, 2399, 2402; 8 An. 484. He has not shown that the property was given for an inadequate price or that he has been injured by the *dation en paiement*.

The defendant took a bill of exceptions to the testimony of Ursin Perret on the grounds that it contradicted the notarial act of donation to his daughter. We agree with the district judge that his testimony does not conflict with said act. The donation was made to the daughter, and the testimony of U. Perret shows that the money was delivered to the husband.

The other bills of exceptions are unimportant.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, that the injunction be perpetuated and that the plaintiff, M. E. Perret, have judgment against Bernard Sanarens for one hundred and fifty dollars damages and costs in both courts.

No. 830.

VINCENT BOAGNI v. VICTOR FOUCHY.

The presumption is that every one, capable of contracting, knows what an obligation is which he signs, and he can not be relieved from the effects of his act by showing that he does not understand the language in which the obligation is written.

APPEAL from the Eighth Judicial District Court, parish of Calcasieu. *Morgan, J. G. H. Wells*, for plaintiff and appellant. *L. Leveque, F. Penodin*, for defendant and appellee.

LUDELING, C. J. This is an action on promissory notes bearing eight per cent. interest from twenty-eighth of January, 1867, the date of the notes. The answer admits the execution of the notes, but avers that interest should run only from the maturity of the notes, that having been the agreement, and that the plaintiff fraudulently wrote the notes in English and made them bear interest from date instead of their maturity. He further alleges that there was a special agreement with plaintiff, by which the plaintiff bound himself to remit the interest on the notes if he paid five hundred dollars, which sum was paid. Interrogatories on facts and articles were propounded to the plaintiff to sustain this defense and the plaintiff emphatically denied them. The defendant then made himself a witness for himself and he contradicts the answer of the plaintiff to the interrogatories on facts and articles.

Boagni v. Fouchy.

But this can not overthrow the answers of the plaintiff thus obtained, particularly when corroborated by the notes signed by the defendant.

The presumption is that every one capable of contracting, knows what an obligation is which he signs, and he can not be relieved from the effects of his act by showing that he does not understand the language in which the obligation is written. The letters of the plaintiff offered in evidence do not establish any agreement to remit interest or any part of the debt.

It is therefore ordered and adjudged that the judgment of the lower court be amended by allowing interest at the rate of eight per cent. per annum on the debt, from the twenty-eighth of January, 1867, and that, as thus amended, it be affirmed. Appellee to pay costs of appeal.

No. 834.

SUCCESSION OF R. P. EPPERSON.

Among the several grounds of opposition to a public administrator's account it was urged, that said public administrator had not been legally appointed. To this the Administrator excepted on the ground that it was an attempt to remove him from office, which he maintained, could only be done by direct action. The judge *a quo* erred in dismissing the opposition. Admitting that in such a proceeding as was before the court, the administrator's capacity could not be questioned, still his exception should only have been maintained in so far as it related to the denial of his capacity. The merits of the opposition on other points remained intact, and the opponent had a right to have them passed upon.

APEAL from the Parish Court, parish of Vermilion. *Guegnon, J. R. S. Perry*, for opponent and appellee. *F. R. King*, for the succession, appellee.

MORGAN, J. The public administrator published an account of his administration. The account was opposed by Perry, administrator of the succession of Bradley. Among other grounds of opposition, it was urged that the public administrator had not been legally appointed. To this opposition the administrator excepted on the ground that it was an attempt to remove him from office, which, he says, can only be done by direct action. His exception was maintained and the opposition dismissed. The judge erred. Admitting that in such a proceeding as is now before us, the administrator's capacity could not be questioned, still his exception should only have been maintained in so far as it related to the denial of his capacity. The exception maintained in this regard, still left the merits of the opposition intact, and the opponent had a right to have them passed upon.

It is therefore ordered adjudged and decreed that the judgment of the parish court be avoided, annulled and reversed, and that the case be remanded to be proceeded with according to law, the costs of appeal to be borne by the administrator.

No. 833.

SUSAN A. WEBB v. AMELIA E. KELLER. PAYNE et als. Intervenor.

The defendant, dative tutrix, alleging that the condition of the estate of her deceased husband required a sale of the property belonging to it, had it sold after the usual judicial proceedings, and purchased it all. She subsequently filed a tableau placing herself thereon as a creditor for a sum larger than the property was appraised at. This tableau was homologated. After the adjudication she mortgaged the property to certain individuals. One of the defendant's children prays that said sale be declared null and void. Payne, claiming to control said mortgage, intervenes to have said mortgage recognized and enforced.

The exception to the intervention on the ground that the demands made by the intervenor were not incidental to, or necessarily connected with, the actions between the parties, is not well founded. The foundation upon which the intervenor's mortgage rested, was the sale made under order of court to the defendant. If the sale was null, his mortgage was null also, because the defendant would not have had any title to the property mortgaged. Although the judgment in this case, between the plaintiff and defendant, would not probably have been conclusive of his rights, he not having been a party to the suit, still he had such an interest in the result in the controversy as to entitle him to intervene.

The title to the property purchased by the defendant, as stated, is, as to third parties, good and valid. Those who dealt with her did so under the faith of judicial proceedings. To set aside the sale made under the authority of justice and thus destroy the mortgage which was taken as the result thereof, and which was accepted in good faith, would be to make like proceedings snares instead of shields.

If plaintiff's tutrix has assumed responsibilities towards her, and has been derelict in the performance of any duty, the judgment of the district court in this case reserves her rights against said tutrix, and this is her only recourse.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J. Henry L. Garland*, for plaintiff and appellant. *John E. King, B. A. Martel & Hudspeth*, for intervenors and appellees.

MORGAN, J. Lewis A. Kell Webb died in 1861. He left a widow and two children, both of whom were minors. His property consisted principally of lands and slaves, of which a large proportion belonged to the community of acquets and gains. Some of it was separate property. He appointed his widow executrix of his will, and bequeathed to her his entire estate. She qualified as executrix and as natural tutrix, and took possession, it is alleged, of the entire estate. The widow married. The marriage having taken place without the intervention of a family meeting her tutorship ended. Subsequently, however, she was appointed dative tutrix. Her husband was her co-tutor. Alleging that the condition of the estate required a sale of the property belonging to it, she obtained an order therefor. She also caused the property to be appraised. A meeting of the family was called to deliberate as to the terms upon which it should be sold. The family meeting recommended that all the property of the deceased, separate and community, be sold for cash. The under tutor approved of this recommendation. The property was sold on the fifth of January, 1870. The mother purchased it all. She subsequently filed a tableau placing herself thereon as a creditor for a sum larger than the property was appraised at. This tableau was homologated.

26	596
44	49

26	596
48	600
49	181

Susan A. Webb v. Amelia E. Keller.

After the adjudication to her she mortgaged the property she had purchased to Payne, Huntington & Co., and also to Payne, Dameron & Co. Here commences the contest. Petitioner, one of Webb's children, prays that the sale and adjudication made to her mother on the fifth January, 1870, be declared null and void; that the property be declared to belong to her sister and herself; that the defendant be condemned to pay twenty thousand dollars, amount of revenue of the property belonging to the succession of her father, received by the defendant since the first January, 1870. To this proceeding the defendant seems to have interposed no obstacle.

But J. W. Payne obtained leave to intervene, and, setting up the mortgages given by the defendant to Payne & Huntington, and to Payne, Dameron & Co., which mortgages he claims to control, prays that the plaintiff may take nothing by her action, and that he have judgment against the defendant for the amount of the notes which he holds; that his mortgage may be recognized and enforced, and the property sold to satisfy the same. There was judgment in his favor, and the plaintiff has appealed. In the district court plaintiff moved to strike out that portion of the intervention which related to and asked for judgment in intervenor's favor against the defendant and for the foreclosure of the mortgage. This motion being overruled, plaintiff, upon the trial, objected to the introduction of evidence upon these issues. The objection was, that the demands made by the intervenor against the defendant were not incidental to, or necessarily connected with, the action between the parties. The objection was not sustained and the plaintiff excepted to the ruling of the judge.

It does not seem to us that the court erred. The foundation upon which the intervenor's mortgage rested was the sale made under order of court to the defendant. If that sale was null, his mortgage was null, because the defendant would not have had any title to the property mortgaged. And although the judgment in this case, between the plaintiff and defendant, would not, probably, have been conclusive of his rights, he not having been a party to the suit; still it appears to us that he had such an interest in the result of the controversy as to entitle him to intervene. If he had the right to intervene, the purposes for which he could intervene are not limited. If he has the right to have the property mortgaged to him sold, he can, it seems to us, assert that right in this proceeding as well as he could in a direct action.

It appears to us that the title to the property purchased by the defendant on the fifth January, 1870, is, as to third parties, good and valid. Defendant was the executrix of a will. She obtained authority to sell the property of the testator in order to pay the debts of his succession, and to make a partition between herself and the heirs. An

Susan A. Webb v. Amelia E. Keller.

appraisement of the property was ordered; a family meeting was convened, who recommended that the whole property of the succession, whether separate or community, be sold for cash. The under tutor concurred in this advice. The property was sold; the defendant became the purchaser. She subsequently furnished an account of her administration, which account, after due publication, was homologated. It was after the sale that the intervenors' mortgage was taken. The title being in the defendant the property was her's, to do with as she pleased. She could sell it, or she could mortgage it. Those who dealt with her did so under the faith of judicial proceedings. To set aside the sale made under the authority of justice, and thus destroy the mortgage which was taken as the result thereof, and which was accepted in good faith, would be to make like proceedings snares instead of shields.

We have not failed to be impressed with the positions taken by plaintiff's counsel, and which have been ably argued in his brief. Plaintiff's tutrix may have assumed responsibilities towards her, and may have been derelict in their duty. But this is no reason why those who acted in good faith, and whose acts were based upon the orders of a court of competent jurisdiction, should be made to suffer.

The judgment of the district court reserves her rights against her tutrix, and this, we think, is her only recourse.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 867.

A. BERARD, Administrator, v. C. YOUNG, Sheriff, et als.

Where the execution under which the sale was to be made issued from the parish court, it is in that court that the disposal of the proceeds must be determined. The exception to the jurisdiction was properly taken.

APPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. Deblanc & Fournet*, for plaintiff and appellant. *Joseph A. Breaux*, for defendants and appellees.

HOWELL, J. This is a proceeding by third opposition, in which the plaintiff claimed the proceeds of property about to be sold by the sheriff. The defendants except to the jurisdiction of the court *ratione materiae*.

The execution, under which the sale was to be made, issued from the parish court, and it is in that court that the disposal of the proceeds must be determined. The exception was therefore properly maintained.

Judgment affirmed.

 State of Louisiana v. Gilmore.

No. 866.

THE STATE OF LOUISIANA v. JOHN J. GILMORE.

The prisoner requested the judge to reduce his charge to the jury to writing. This he refused to do. The request was made before the charge was delivered. To the judge's refusal a bill of exception was taken. The exception must be sustained.

A PPEAL from the Third Judicial District Court, parish of Iberia. *Train, J.* Criminal case. *R. L. Belden*, District Attorney, for the State, appellee. *J. A. Breaux*, for defendant and appellant.

MORGAN, J. The defendant was prosecuted under an information filed by the District Attorney, for libel. He was found guilty and sentenced to pay a fine of \$305, or to be imprisoned for thirty days. He has appealed.

The prisoner requested the judge to reduce his charge to the jury to writing. This he refused to do. The request was made before the charge was delivered. To which a bill of exception was taken.

The judge refused to the accused a right guaranteed to him by the law. Sec. 2133 of the Revised Statutes provides that "in all cases appealable to the Supreme Court, it shall be the duty of the judge to deliver his charge to the jury in writing, if the counsel of either party require the same."

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and that the case be remanded to be proceeded in according to law.

 No. 860.

THE STATE OF LOUISIANA v. WILLIAM HOOZER et als.

The absence of part of the jurors at the time and when the case was called for trial, in no manner deprived the defendants of the opportunity of inquiring into the character and qualifications of the jurors. A sufficient number of jurors being present to form the panel, the court did not err in ruling the defendants to trial.

Having had all the notice the law requires in order to prepare their challenges, the defendants were not entitled to a postponement of the trial, because all the jurors summoned for the term were not present.

A PPEAL from the Eighth Judicial District Court, parish of Calcasieu. *Morgan, J.* Criminal case. *George W. Hudspeth*, District Attorney, for the State, appellee. *G. H. Wells*, for defendants and appellants.

WYLY, J. The defendants having been convicted of the crime of shooting and wounding with a dangerous weapon while perpetrating a robbery, appeal from the judgment sentencing them to the penitentiary for life.

They complain that the court erred in forcing them to trial in opposition to their written objections, alleging that of the list of the forty-

State of Louisiana v. Hoozer et als.

four petit jurors drawn for the term and served on them, only twenty-one were present, while they were entitled to thirty-six peremptory challenges and the State to six; that in consequence of the absence of said jurors they were unable to prepare their challenges. What legal right the defendants were deprived of is not perceived. They do not deny that they were duly served with a list of the petit jurors drawn for the term.

The absence of part of the jurors at the time and when the case was called for trial, in no manner deprived the defendants of the opportunity of inquiring into the character and qualifications of the jurors. A sufficient number of jurors being present to form the panel, the court did not err in ruling the defendants to trial. Having had all the notice the law requires in order to prepare their challenges, the defendants were not entitled to a postponement of the trial because all the jurors summoned for the term were not present.

Judgment affirmed.

Rehearing refused.

26	600
118	851

No. 862.

JULIE GUILBEAU, widow, etc., v. PIERRE S. WILTZ et als.

On the nineteenth of June, 1873, P. S. Wiltz obtained from the district court in St. Landry an order of seizure and sale against a certain piece of property. On the twenty-first, notice thereof was served on the plaintiff, administratrix of the estate of the deceased owner of the mortgaged property, and the seizure was made on the twenty-fourth of the same month, a keeper was put in possession and notice of the seizure served on the plaintiff and administratrix. The property was subsequently sold and adjudicated to P. S. Wiltz & Co. on the sixth September, 1873.

On the twenty-fourth of June, 1873, the probate court of St. Landry homologated the deliberations of a meeting of the creditors of the deceased convoked on the petition of the administratrix, and held on the twentieth of June, 1873. The judgment of homologation ordered the sale of all the property of the estate, including that in dispute here, and which was then actually in the jurisdiction of the district court. Under this order the said property was adjudicated to the plaintiff and administratrix on the thirty-first of July, 1873:

Held—That the mortgage creditor had the right to go into the district court to have the mortgaged property sold. That court having been seized of jurisdiction of the property, the order of the probate court was ineffectual to divest that jurisdiction, and the sale thereunder to the defendants and appellants was not the sale of the property of another, as contended by the plaintiff and appellee. On the contrary, the sale under the order of probate conveyed no title.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J. Joseph H. Moore*, for plaintiff and appellee. *Bailey & Estilette*, for defendants and appellants.

HOWELL, J. The plaintiff, widow of Oscar Buillard, sues to annul a sale of land made by the sheriff to the defendants under executory proceedings instituted by one of the latter.

The material facts are: On nineteenth June, 1873, P. S. Wiltz ob-

Julie Guilbeau v. Wiltz et al.

tained from the district court in St. Landry an order of seizure and sale against the property in question. On twenty-first same month notice thereof was served on the plaintiff, administratrix of the deceased owner of the mortgaged property, and the seizure thereof was made on the twenty-fourth of same month, a keeper or guardian put in possession, and notice of the seizure served on the plaintiff and administratrix. The property was advertised to be sold on the second August, 1873, but there being no bid it was readvertised to be sold at twelve months' credit on sixth September following, when it was adjudicated to the defendants, P. S. Wiltz & Co.

On the twenty-fourth June, 1873, the probate court of St. Landry homologated the deliberations of a meeting of the creditors of the deceased convoked on the petition of the administratrix, and held on twentieth June, 1873. The judgment of homologation ordered the sale of all the property of the estate, including that in dispute here, and which was then actually in the jurisdiction of the district court. Under this order the said property was adjudicated to the plaintiff and administratrix on thirty-first July, 1873.

The defendants make the following points:

First—The ordinary jurisdiction being seized of the matter, could not be ousted by any subsequent exercise of the probate jurisdiction, both jurisdictions being equally competent.

Second—The proceedings culminating in the probate decree of twenty-fourth June, 1873, were inchoate on nineteenth of June, when the executory process issued; and they were *ex parte*, it not appearing that P. S. Wiltz, the mortgage creditor, who took out the said executory process, was either notified of the order of court convoking the meeting of creditors or present at said meeting. "*De non apparentibus et de non existentibus eadem est lex.*"

Third—At the date of the probate sale, under which appellee claims, the property in dispute was in the custody of the sheriff, under the writ issuing at the suit of Pierre S. Wiltz in his executory proceedings.

Fourth—The adjudicatee at the probate sale provoked by Julie Guilbeau, administratrix, was Julie Guilbeau herself, upon whom, on twenty-first June, 1873, notice of the order of seizure and sale issuing out of the district court, at suit of P. S. Wiltz, was served, and it is contended that the plaintiff in the executory proceeding had the right entirely to disregard the probate sale and the proceedings preceding the same.

We think the points and conclusion of the appellants well made and sustained by the law. The mortgage creditor had the right to go into the district court to have the mortgaged property sold, and that court having been seized of jurisdiction of the property, the order of the

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probate court was ineffectual to divest that jurisdiction, and the sale thereunder to the appellants was not the sale of the property of another, as contended by the appellee. On the contrary, the sale under the order of probate conveyed no title.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the demand of the plaintiff be rejected, and the defendants, Pierre S., Patrick S. and Louis A. Wiltz, be decreed the owners of the property described in plaintiff's petition, and purchased by them at sheriff's sale on sixth September, 1873. Costs of both courts to be paid by plaintiff.

Rehearing refused.

No. 837.

EUPHRASIE PELAGIE G. TESSIER v. ROBERT HART LITTELL, Testamentary Executor.

Where it is evident that the basis of the action is the right to an account to be rendered by the testamentary executor, this court will, *ex proprio motu*, decide that the District Court which rendered the judgment, had no jurisdiction *ratione materiae*. In this instance, it is the demand of parties claiming to be heirs, in a succession under administration, and it should therefore have been instituted in the parish court.

APPEAL from the Eighth Judicial District Court parish of St. Landry. *Laurent Dupré*, acting Judge. *Lewis & Bros.*, for plaintiff and appellee. *J. L. M. Moore*, for defendant and appellant.

MORGAN, J. Alfred Moore died in December, 1849.

Jonathan Harris was appointed administrator of his estate in January, 1850. He caused an inventory of the property left by the deceased to be made. The property was appraised at \$580 50. It was sold under order of court, and brought \$530 10. On the twenty-third of May, 1854, he filed an account of his administration, and a tableau showing the debts due by the estate, amounting to \$609 67½. This tableau was published according to law; no opposition was made to it, and on the first of July, 1854, it was homologated, and the administrator was ordered to pay the creditors in conformity thereto.

Harris died in 1868. Littell is the dative testamentary executor of his will.

On the twenty-fourth of November, 1871, twenty-four years after Moore's death, seventeen years after the homologation of Harris' tableau, and four years after Harris' death, this suit was instituted.

Plaintiffs alleging themselves to be the widow and children of Alfred Moore, claim from the succession of Jonathan Harris, forty-five hundred dollars with twenty per cent. interest per annum from December, 1849. They allege that shortly before Moore's death, he sent for Harris and requested him to take charge of his affairs, and that three days after

Tessier v. Littell.

is death, Harris came to the house and demanded of the widow the property and money belonging to the estate, and that on or about the seventh of December, 1849, which was before Harris was appointed administrator, she gave him four thousand five hundred dollars, the property of her husband's estate. They aver that Harris never inventoried nor accounted in any manner whatever for the money thus delivered to him; that he never rendered a full, fair and perfect account of his administration, and therefore, that his succession is responsible to them for the amount above set forth and the interest as claimed. They had judgment in the court below with five per cent. interest from seventh of December, 1849, subject to a credit of \$400, paid in April, 1857.

We feel constrained to say, *ex proprio motu*, that the District Court which rendered this judgment was without jurisdiction, *ratione materiæ*. It is evident that the basis of this action is the right to an account. It is the demand of parties claiming to be heirs, in a succession under administration, and should have been instituted in the parish court. It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that the suit be dismissed with costs.

No. 838.

ARTHUR SIMON v. CHARLES H. WALKER and Sheriff.

There are not sufficient causes to dismiss the appeal on the grounds: That the certificate of the clerk is too comprehensive; that the appellant proceeded by rule to set aside the order dissolving the injunction before petition and order of appeal; and that the suit is still pending on the merits in the district court.

Even if the certificate of the clerk could be regarded as defective, because it embraced more than is necessary, that is no cause for the dismissal of an appeal.

It is manifest that the injunction in this case should not have been set aside on bond, as the plaintiff in injunction had alleged and sworn that the sale would work him an irreparable injury. The order setting aside the injunction must be annulled.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Tucker & Dumartrait*, for plaintiff and appellant. *D. Caffery*, for defendant and appellee.

LUDELING, C. J. This is an appeal from an interlocutory order setting aside an injunction on defendant's giving bond. A motion to dismiss the appeal has been made on the grounds that the certificate of the clerk is too comprehensive; "that the appellant proceeded by rule to set aside the order dissolving the injunction before petition and order of appeal," and that the suit is still pending on the merits in the district court. These are not causes for dismissing an appeal.

Even if the certificate of the clerk could be regarded as defective,

Simon v. Walker and Sheriff.

because it embraced more than is necessary, that is no cause for the dismissal of an appeal.

On the merits of this appeal, it appears that the plaintiff obtained an injunction to prevent the sale of one hundred and sixty acres, etc., worth \$2000, claimed as a homestead. He alleged and swore that the sale thereof would work him an irreparable injury. This injunction was set aside by the plaintiff in execution, he giving bond, and the plaintiff in injunction took a devolutive appeal after the sale.

It is manifest that the injunction should not have been set aside on bond, as the plaintiff in injunction had alleged and sworn that the sale would work him an irreparable injury. C. P. 307. But the order was granted and the sale was made. It is impossible for us to reinstate the injunction to prevent an accomplished fact. If on the trial of the merits of the injunction suit it should be ascertained that the plaintiff in injunction had a homestead right on the lands and personal property described in his petition, it will be competent for the court to grant him adequate remedy. At present this court can afford him no practical relief.

It is therefore decreed that the order setting aside the injunction be annulled with costs.

No. 865.

STATE OF LOUISIANA v. OZEME FRUGE.

As to the sufficiency of the proof to sustain the charge of murder against the defendant, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J.* Criminal case. *G. W. Hudspeth*, District Attorney, for the State, appellee. *Joseph M. Moore* and *B. A. Martel*, for defendant and appellant.

WYLY, J. The defendant was tried and convicted of murder, and from the judgment sentencing him to be hanged, he has appealed. There is no bill of exceptions nor assignment of errors, and from the record the proceedings appear to be regular. The counsel suggest, however, in their brief, that the defendant was convicted on the testimony of an accomplice, unsupported by any other evidence, and that he was unworthy of belief. As to the sufficiency of the proof to sustain the charge, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

It is therefore ordered that the judgment herein be affirmed with costs.

State of Louisiana v. Nunez.

No. 832.

STATE OF LOUISIANA v. ALADIN NUNEZ.

The objection set up in a motion in arrest of judgment, that Charles W. DuRoy, who filed the information as district attorney *pro tempore*, was not appointed to that office and consequently that his official act was a nullity, came too late. If the exception is a good one, it should have been pleaded before going into the trial. Besides, in a motion in arrest of judgment, only errors fatal on the face of the record can be examined.

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton, J.* Criminal case. *Joseph A. Chargois*, District Attorney, for the State, appellee. *William Mouton, DeBlanc & Fournet*, for defendant and appellant.

WYLY, J. The defendant having been convicted of larceny appeals from the judgment sentencing him to the penitentiary for twelve months. The point upon which he relies in this court, is the objection set up in a motion in arrest of judgment, that Charles W. DuRoy, who filed the information as district attorney *pro tempore*, was not appointed to that office, and consequently his official act was a nullity.

We think the court did not err in holding that this objection comes too late. If the exception is a good one, it should have been pleaded before going into the trial. Besides, in a motion in arrest of judgment, only errors patent on the face of the record can be examined.

Judgment affirmed.

No. 857.

HYPOLITE BELAIR, Natural Tutor, et als. v. CELINA DOMINGUEZ, Administratrix. Opposition of the heirs to the tableau filed by the administratrix.

26b	605
50	54

The court below did not err, as contended by the opponents, to the tableau of the administratrix, in not charging the community existing between the deceased and his surviving widow with a certain sum of money received by the deceased, during marriage, from the sale of his separate property, because it is not proved that this money was expended by the deceased for the benefit of said community.

Whether the individual debts of the deceased were discharged by the giving in payment of certain slaves belonging to the community existing between the deceased and his surviving widow, administratrix of his estate, or by funds arising from the sale of said slaves, the result is the same. The community should be credited for the amount of its property disposed of for the individual benefit of the deceased.

APPEAL from the Parish Court, parish of Lafayette. *Moss, J. Mouton & Debaillon, Joseph A. Breaux*, for opponents and appellants. *M. E. Girard*, for defendant and appellee.

WYLY, J. The plaintiffs, the heirs of Nicolas Vallot, appeal from the judgment on their oppositions to the account rendered by the defendant, their stepmother, the surviving widow of the deceased and his administratrix. The objections urged in this court will be considered in the order stated in the brief of the appellants :

Belair v. Celina Dominguez.

First—They complain that the court erred in not charging the community existing between the deceased and the defendant with \$389 66, the sum received by the deceased, during marriage, from the sale of his separate property. It is not proved that this money was expended by the deceased for the benefit of the community, and therefore it can not be charged therewith. *Stewart v. Pickard et al.*, 10 R. 18; also 2 An. 44; 11 An. 297.

Second—They object to the credit allowed for the amount of the individual debts of the deceased to the opponents, his heirs by a former marriage, discharged by the giving in payment of certain slaves belonging to the community. We think the court did not err. Whether the debts were paid by funds arising from the sale of the slaves, or the giving of them in payment thereof, the result is the same; the community should be credited for the amount of its property disposed of for the individual benefit of the deceased.

Third—The item of \$525 76, credited as payment to Aurore Thériot, is sustained by the evidence. Also the item of \$347 77 is correct. We see no error in the judgment.

Judgment affirmed.

26 606
46 635

No. 843.

VALCOURT VEAZY v. ONEZIME TRAHAN, JR., Administrator.

The objection to the jurisdiction of the district court over the demand of the plaintiff can not be maintained, but, as the administrator of the estate of the deceased represents only the creditors of the succession, and has power only to pay the debts and turn the *residuum* over to the heirs, he can not represent the latter in a controversy to settle the rights of the respective partners in community, nor in a partition of the community property. A judgment against the administrator in this case would not bind the heirs of the deceased. The judge *a quo* did not err in dismissing the suit against the administrator.

A PPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton, J. F. B. King*, for plaintiff and appellant. *R. P. O'Bryan*, for defendant and appellee.

HOWELL, J. The plaintiff, as surviving husband, instituted this suit in October, 1872, against the administrator of the succession of his wife, who died in February, 1864, to recover one-half of the proceeds of the personal property sold in August, 1864, and to partition the land and obtain the usufruct of the property of the deceased, alleging that all the property inventoried and sold belonged to the community, and there were no debts, or if any, they had long since been paid. The defendant excepted:

First—That no proceedings can be had against him for the partition of land, he being incompetent to stand in judgment in such suit and no other heirs being cited.

Veazy v. Trahan.

Second—That the claim for money can not be passed on by the district court, it being a probate matter.

Third—The suit is premature, no tableau of distribution having been filed, on an opposition to which alone this demand can be urged.

From a judgment maintaining these exceptions the plaintiff has appealed. The district court has jurisdiction of the demand, but as the administrator represents only the creditors of the succession and has power only to pay the debts and turn the *residuum* over to the heirs, he can not represent the latter in a controversy to settle the rights of the respective partners in community, nor in a partition of the community property. A judgment against the administrator in this case would not bind the heirs of the deceased. The judge *a quo* did not err in dismissing the suit against the administrator.

Judgment affirmed.

No. 846.

EUGENE PETETIN v. VINCENT BOAGNI, Administrator.

The prescription of five years is pleaded against the plaintiff who sues the administrator of one of the solidary obligors on a promissory note. The plaintiff having offered to prove that the prescription had been interrupted as to the deceased, Steen, by the testimony of the other maker of the note, Hardy, establishing Hardy's acknowledgment of the obligation before prescription had accrued, and having also offered other witnesses to the same effect, this was objected to on the ground that parol testimony was inadmissible to prove any acknowledgment or promise to interrupt the prescription of a debt against a person deceased;

Held—That the overruling of the objection by the court *a qua* was correct.

The evidence offered was not to prove the promise or acknowledgment of the deceased debtor, Steen, but to prove the acknowledgment of Hardy, the living debtor, nor was it to prove the creation of a new debt, after the old one had been extinguished by prescription. The acknowledgment of Hardy, a debtor *in solido* with Steen, interrupted the prescription as to him or his estate.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J. Henry L. Garland*, for plaintiff and appellee. *B. A. Martel & Hudspeth*, for defendant and appellant.

LUDELING, C. J. The plaintiff sues the administrator of one of two solidary obligors on a promissory note, who pleads the prescription of five years.

To prove that the prescription had been interrupted as to the deceased Steen, the plaintiff offered the testimony of the other maker of the note, Hardy, and of other witnesses, to prove the acknowledgment of Hardy before prescription had accrued. This was objected to substantially on the ground that parol testimony was inadmissible to prove any acknowledgment or promise to interrupt the prescription of a debt against a person deceased. The objection was overruled, the testimony was received and a bill of exceptions was taken to the ruling.

 Petelin v. Boagni.

We think the ruling correct. Article 2278 R. C. Code declares, "parol evidence shall not be received : 1. To prove any acknowledgment or promise to pay any judgment, sentence or decree of any court of competent jurisdiction, etc., for the purpose of reviving the same after prescription has run. 2. To prove any acknowledgment or promise of a party deceased to pay any debt or liability, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed. 3. To prove any promise to pay the debt of a third person. 4. To prove any acknowledgment or promise to pay any debt or liability evidenced by writing, when prescription has already run.

But in all the cases mentioned in this article, the acknowledgment or promise to pay shall be proven by written evidence signed by the party, who is alleged to have made the acknowledgment or promise, or by his specially authorized agent or attorney in fact."

The testimony offered is not prohibited by said article.

Paragraph two of the article forbids the proof, by parol, of an acknowledgment or promise of a party deceased. Paragraph four forbids the parol proof of any acknowledgment or promise, after prescription had already run.

The evidence offered was not to prove the promise or acknowledgment of the deceased debtor Steen, but to prove the acknowledgment of Hardy, the living debtor ; nor was it to prove the creation of a new debt, after the old one had been extinguished by prescription. The acknowledgment of Hardy, a debtor *in solido* with Steen, interrupted the prescription as to him or his estate. C. C. 3552.

It is not necessary to notice the other bills of exceptions in this case.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

 No. 855.

D. O'BRYAN, Agent v. GEORGE McVEY.

The possession of the lessee being only that of his lessors, when the fact was disclosed by the answer of the lessee, who is defendant in this instance, his lessors should have been made parties to the suit which is a hypothecary action against lands alleged to be mortgaged in favor of the plaintiff and owned by the lessors of defendant. No valid judgment could be rendered in the case without the parties interested being before the court.

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton, J. D. O'Bryan, Breaux & F. R. King*, for plaintiff and appellee. *DeBlanc & Perry*, for defendant and appellant.

LUDELING, C. J. This is a hypothecary action against lands alleged to be mortgaged in favor of the plaintiff, and alleged to be in possession of George McVey.

O'Bryan v. McVey.

He answered and averred that he was the lessee of Robertson & Avery, the owners of the lands and asked that they might be notified of this proceeding.

This the district judge refused to order, and judgment was rendered ordering the property to be seized and sold to satisfy the mortgage, unless the lessee paid the debt within ten days after the notification of this judgment. The defendant appealed. Robertson & Avery were the owners of the lands encumbered with the mortgage, and therefore the third possessors thereof, the possession of the lessee being only that of his lessors; and when this fact was disclosed by the answer of McVey, his lessors should have been made parties to the suit. No valid judgment could be rendered in this case without the parties interested being before the court.

It is therefore ordered and adjudged that the judgment of the court *a qua* be annulled and that the case be remanded to cite the owners and third possessors of the property mortgaged and to be tried *de novo*.

It is further ordered that the costs of appeal be paid by the appellee. Rehearing refused.

No. 844.

SUCCESSION OF PIERRE CABROL. Opposition of MARIE NEZAT.

Where the dative testamentary executor contended that none of the issues raised in a supplemental petition of opposition of the ninth August, 1873, to his tableau and final settlement, could be entertained by the court, because before that, to wit: on the fourth of August there was judgment homologating all the items not opposed:

Held—That as the original petition opposed in general terms the homologation of all the items of the account, except the law charges and costs, it follows that only these items were homologated by the judgment of the fourth of August, 1873. The supplemental petition of the ninth of August supplies, so far as the items therein specified, the deficiency complained of in the original petition of opposition. It cures to that extent the objection of vagueness. The court *a qua* erred therefore in dismissing the opposition.

APPEAL from the Parish Court, parish of Vermilion. *Guegnon, J. F. R. King*, for the succession, appellee. *James A. Breaux*, for opponent and appellant.

WYLY, J. Marie Nezat, widow of Pierre Cabrol and now wife of E. Noel, appeals from the judgment dismissing her opposition to the homologation of the final account of the dative executor of Pierre Cabrol.

The petition was filed on the thirtieth July, 1873, opposing in general terms all the items of the account except the law charges and costs. This was excepted to on the ground that the petitioner was not authorized by her husband, and the petition was too vague to apprise the executor of the specific grounds of opposition and to enable him to prepare a defense.

On fourth August a supplemental petition of opposition was filed. It was dismissed, however, on motion of the petitioner, and on the ninth August another supplemental petition of opposition was filed, in which the opponent objected to the item charged as commissions by the executor, also to the fee of the attorney of absent heirs, also to the item charged as money paid to C. H. Remick on the ground that the note was prescribed.

The husband of the opponent appeared to authorize his wife before there was a trial of the exceptions, and this was sufficient.

The accountant, however, contends that none of the issues raised in the supplemental petition of opposition of the ninth August, 1873, can be entertained by the court, because before that, to wit: on fourth August there was judgment homologating all the items not opposed. As the original petition opposed in general terms the homologation of all the items of the account except the law charges and costs, it follows that only these items were homologated by the judgment of fourth August, 1873. The supplemental petition of ninth August supplies, so far as the items therein specified, the deficiency complained of in the original petition of opposition. It cures to that extent the objection of vagueness.

Our conclusion is that the court erred in dismissing the opposition.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that this case be remanded in order that the issues specified in the supplemental opposition of the ninth August, 1873, may be tried on the merits, and for further proceedings according to law, appellee paying costs of appeal.

No. 839.

JOSEPH MALLON and Wife v. FREDERICK L. GATES.

In the name of Joseph Mallon and his wife an injunction was taken to stop the sale of a plantation belonging to Joseph Mallon, on the grounds that they were entitled to a homestead. The wife made the affidavit and executed the bond, having been authorized to do so by the judge, on proof that the husband was absent.

The right to the benefit of the homestead act is not established by the facts of this case. But the husband, who alone could have asserted the right, if it existed, is not before the court, and nothing therefore can be decided to affect his rights. The wife has asserted no right personal to herself in this suit, and she has no right to represent her husband in the matter, nor can she bind him by her acts.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. R. L. Belden, Allen & Foster*, for plaintiff and appellee. *Frederick Gates*, for defendant and appellant.

LUDELING, C. J. Joseph Mallon confessed judgment in a suit to enforce payment of a note secured by mortgage in July, 1872. In August, 1873, the judgment creditor caused execution to be issued, and

Mallon and Wife v. Gates.

the property of Joseph Mallon was seized and advertised for sale. On the third of September a petition, in the name of Joseph Mallon and his wife, was filed, praying for an injunction to stop the sale of the plantation of Joseph Mallon, on the grounds that they were entitled to a homestead, etc. The wife made the affidavit and executed the bond for the injunction, having been authorized to do so by the judge, on proof that the husband was absent.

There was judgment in favor of the wife for one hundred and sixty acres of the land, etc. The defendant appealed.

The following facts appear from the record: That the plantation seized belonged to the husband, the debtor; that he and his wife resided in Franklin more than a year preceding the seizure, and that the husband had left the State, apparently with the intention not to return to St. Mary parish. It further appears that Mallon and wife have no children or other person directly and legally dependent upon them. It is therefore manifest that they have no right to the benefit of the homestead act. But the husband, who alone could have asserted the right, if it existed, is not before the court, and we can not therefore decide anything to affect his rights. The wife has asserted no right, personal to herself in this suit, and she has no right to represent her husband in the matter, nor can she bind him by her acts.

It is therefore ordered and adjudged that the judgment of the district court be annulled, and that there be judgment in favor of the defendant against the plaintiff and her sureties on the injunction bond for \$500 damages. It is further ordered that the costs in both courts be paid by the plaintiff.

No. 858.

CLET PROVOST et als. v. URSIN PROVOST.

If the plaintiffs have any rights in the land, a portion of which they claim by suit in the parish court, these rights descend to them from one succession which was opened in 1816, and another which was opened in 1850. Neither of these successions now exist. They have been closed. The property sought to be divided is alleged to be worth \$50,000. Under this state of facts the parish court was without jurisdiction.

A PPEAL from the Parish Court, parish of Iberia. *Fontelieu, J. B. L. Belden*, for plaintiffs and appellants. *Z. F. Fournet*, for defendant and appellee.

MORGAN, J. Plaintiffs claim from the defendants the partition of certain lands situated in the parish of Iberia. They have instituted their suit in the parish court.

If they have any rights in the land, a portion of which they claim, these rights descend to them from one succession which was opened in

Provost et als. v. Provost.

1816, and another which was opened in 1859. Neither of these successions now exist. They have been closed. The property sought to be divided is alleged to be worth \$50,000. Under this state of facts the parish court was without jurisdiction. 25 An. 143.

The judgment dismissing the suit for want of jurisdiction is correct. Judgment affirmed.

No. 863.

STATE OF LOUISIANA v. SOSTHENE HERPIN.

Where the appearance bond by the defendant in a criminal prosecution was taken and approved by the parish judge before whom the preliminary examination was had, the fact that there is no order committing the defendant for trial before the district court, nor any order admitting him to bail, nor fixing the amount of the bail, can not avail in assignment of error.

Where it is manifest in the record that the word August is written by mistake for July, it is a mere clerical error which is controlled by the context and accompanying documents.

While the court was in session, the fact that the petit jury and witnesses in criminal matters were discharged for two or three days at a time, on different occasions during the said term, did not release the defendant from the obligation of his appearance bond.

A PPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton, J.* Criminal case. *J. A. Chargois*, district attorney, for the State, appellee. *M. E. Girard*, for defendant and appellant.

HOWELL, J. This is an appeal from a judgment on an appearance bond given by the defendant in a criminal prosecution.

First—The first assignment of error is that there is no order committing the defendant for trial before the district court, no order admitting him to bail nor fixing the amount of the bail.

The bond is taken and approved by the parish judge, before whom, it seems, the preliminary examination was had, and hence the alleged omissions or defects do not avail.

Second—The information charges the defendant with an offense committed on the thirty-first day of August, 1869, while the bond was given on the seventh of said month, and such bond could not be forfeited for an offense committed after the date of the bond.

It is manifest in the record that the word August is written by mistake for July, and is a mere clerical error which is controlled by the context and accompanying documents.

Third—There was no court held during the term at which the bond was forfeited, and it was physically impossible for defendant to ask or obtain a trial at that time.

This is an error. The record shows that the court was in session, and the fact that the petit jury and witnesses in criminal matters were discharged for two or three days at a time, on different occasions dur-

State of Louisiana v. Harpin.

ing the said term, did not release the defendant from the obligation of his bond.

Fourth—When the judgment was signed the case had been placed and was on the dead docket, and any action therein taken while on the said docket is an absolute nullity.

The record shows that the bond was forfeited, and the judgment entered against the defendant and his sureties, *in solido*, before the order to place the case in the dead docket, and it could not have been taken therefrom to have the judgment drawn up and signed.

We find nothing in the record to authorize a change in the judgment against the appellants.

Judgment affirmed.

No. 850.

J. M. POOL v. L. FONTELIEU, Public Administrator.

Plaintiff claims a privilege on the buildings which he and his partner, now deceased, erected on a certain piece of ground to which neither of them claimed title, and for the erection of which he paid bills to a certain amount. But this the law does not allow. He stands in the position of a partner who has advanced his partner's proportion towards the construction of certain buildings. It is not to parties occupying such relations that privileges are given.

There was in this case no dispute about title to real estate. The only question was whether plaintiff could establish by witnesses that a house built on a certain piece of ground had been paid for by him. This court thinks he could.

The prescription of three years does not apply to a particular indebtedness in gold which is evidenced by a receipt and which is promised to be paid on demand; and if it came in the category of money loaned, prescription would only commence to run from demand. In the absence of proof to the contrary, the demand must be assumed to have been made only when his petition was served.

A PPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. Deblano & Fournet and Schwing*, for plaintiff and appellant. *James A. Breaux*, for defendant and appellee.

MORGAN, J. Pool claims to be a creditor of the succession of John W. Combs, now under administration, in the sum of four thousand and forty-five dollars and forty-seven cents, and claims a privilege for \$1775 26 on certain property belonging to the succession, which sum he prays may be ordered to be paid in due course of administration.

Subsequently Pool, alleging that the administrator was about to sell certain property as belonging to the estate of Combs, one undivided half of which belonged to him (Pool) filed a third opposition as to a portion of the property advertised for sale, and applied for and obtained an injunction restraining the sale of the one undivided half thereof. The two proceedings were cumulated and consolidated. To the demand contained in the first petition, the administrator files a general denial. He further denies that any privilege exists, and

invokes the prescription of one and three years. Reconvening, he claims judgment against the plaintiff for \$488 82, on an account stated in his reconventional demand. To the injunction he answers that no portion of the property sought to be sold belongs to the plaintiff in injunction. There was judgment in favor of the plaintiff for \$1000 in currency and \$250 in gold, with judicial interest from judicial demand, and the injunction was dissolved. The prescription pleaded was declared to be not available. This appeal is taken from the judgment referred to by the plaintiff.

Plaintiff and deceased were partners in the butchering business. On the eighth March, 1868, the deceased acknowledged an indebtedness to the plaintiff of \$1000. This settlement was, however, subject to correction. On a certain lot of ground, to which neither of them claims title, they built a house. This house seems to have been occupied by the plaintiff. We think it established that after the settlement of the eighth March, 1868, the plaintiff paid bills on the house in question amounting to \$1078 48. Admitting that these payments were made with partnership funds, still one-half thereof belonged to the plaintiff. This would make his interest in the property \$534 20. Added to the acknowledged indebtedness of the eighth March, upon a settlement of accounts between the partnership, the deceased would owe the plaintiff \$1534 20. We think it has been established that the deceased paid on account of the partnership \$226 45, one-half of which is due by the plaintiff. Plaintiff is therefore entitled to a judgment on this part of the case for \$1420 96. He claims a privilege on the buildings. But this the law does not accord to him. He stands in the position of a partner who has advanced his partner's proportion towards the erection of certain buildings. It is not to parties occupying such relations that privileges are given.

Defendant excepted to the introduction of parol testimony to prove title to the property in dispute, on the ground that it was an immovable, to which title could not be established by parol. The error in this position, it seems to us, is that no attempt was made to establish title to an immovable. The only question was whether plaintiff could establish by witnesses that a house, built on a certain piece of ground, had been paid for by him. We think he could.

As regards the claim for gold, the testimony has not satisfied us, as it did not satisfy the district judge that more than \$250 had been established. This sum is evidenced by a receipt for, and a promise to return the same on demand. The prescription of three years, which is pleaded against it, does not apply. It was an acknowledgment of a particular indebtedness to be paid on demand, and if it came in the category of money loaned, prescription would only commence to run

Pool v. Fontellien.

from demand. In the absence of proof to the contrary, we would assume that the demand was only made when the petition was served.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended by allowing the plaintiff \$1420 96 instead of \$1000, in addition to the \$250 in gold; and that in so far as the injunction prayed for is concerned, it be reversed, and that the injunction be made perpetual.

Rehearing refused.

No. 836.

ARSENE CORNER v. CESAIRE BOURG.

The plaintiff, in necessitous circumstances, can not be excluded from the benefit of the homestead law, when it is shown that the entire property of herself and the minor is less than \$1000.

It being proved that the minor owns \$216 95, and she, the widow, \$50, she is entitled to the usufruct of \$733 05 during her widowhood. Afterwards this sum is to vest in and belong to the minor heir of the deceased.

Whether or not the tutor of the minor has applied for the homestead is immaterial. The plaintiff, who has an interest, has made the application. The destination of the money, after the expiration of the usufruct, is fixed by law, regardless of the question whether the tutor of the minor has made a formal application for the homestead or not.

As the plaintiff is not the mother of the minor, she is not dispensed by article 560 of the Revised Code from giving security for the usufruct of the money.

A PPEAL from the Parish Court, parish of Lafayette. *Moss, J. M. E. Girard*, for plaintiff and appellee. *Mouton & Debatillon*, for defendant and appellant.

WYLY, J. The plaintiff, the surviving widow of Michel Bourg, being in necessitous circumstances, opposed the account of the defendant, the administrator of her husband's succession, on the ground that she is entitled to \$1000 under the homestead law. Revised Statutes, 1693, 1694. The court found that she only possessed, in her own right, property of the value of \$50, and gave her judgment for \$950. The defendant appeals. He claims in this court a reversal of the judgment:

First—Because there is a minor of the deceased by a previous marriage who is entitled to the homestead in preference to the plaintiff, his stepmother.

Second—Because, if the surviving widow is entitled to the homestead, it can only be for the usufruct of \$733 05, the minor owning property of the value of \$216 95, and she \$50.

The plaintiff, in necessitous circumstances, can not be excluded from the benefit of the homestead law because it is shown that the entire property of herself and the minor is less than \$1000. She is entitled, under sections 1693 and 1694 of the Revised Statutes, and the proof in the record, to the usufruct of \$733 05 during widowhood, afterwards this sum to vest in and belong to Theovide Bourg, the minor heir of

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Arsene Corner v. Bourg.

the deceased. As the major heirs have no interest it is useless to consider the amount of their property. It can have no bearing in determining the amount of the homestead to be allowed in this case.

Whether or not the tutor of the minor has applied for the homestead is immaterial. The plaintiff, who has an interest, has made the application. She can recover, however, only what the law allows, which is, in this case, a usufruct during widowhood of \$733 05; afterwards, under the express provision of section 1694 of the Revised Statutes, this money must pass to and vest in the minor heir of the deceased. The destination of the money, after the expiration of the usufruct, is fixed by law, regardless of the question whether the tutor of the minor has made a formal application for the homestead or not.

As the plaintiff is not the mother of the minor, she is not dispensed by article 560 of the Revised Code from giving security for the usufruct of the money. Succession of Tassin, 12 An. 885.

It is therefore ordered that the judgment herein in favor of plaintiff be amended to read as follows: It is ordered that plaintiff recover of the defendant \$733 05, to be held in usufruct during widowhood, afterwards to vest in and belong to Theovide Bourg, the minor heir of Michel Bourg, deceased. As thus amended it is ordered that the judgment be affirmed, appellee paying costs of appeal.

No. 834.

LAMBERT B. CAIN, Liquidator v. SOLOMON LOEB.

The form of certificate to the return of a commission to take testimony is not sacramental, and it is sufficient if it appear in the return, when and where and by what authority the deposition of the particular witness was taken.

An affidavit that the district judge was absent from the parish is sufficient under the law to authorize the parish judge to grant the order of the district judge for taking testimony.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J. Henry L. Garland* for plaintiff and appellant. *Lewis & Brother, Bailey & Estilette*, for defendant and appellee.

HOWELL, J. This is a suit on a merchant's account, the defense to which is a general denial and the prescription of three and five years.

From a judgment sustaining the plea of prescription the plaintiff has appealed.

A bill of exceptions was taken to the exclusion of the depositions of the plaintiff, on the ground that in the caption of the return to the commissioner the name of Louis Rose is inserted while the answers are those of L. B. Cain, and in the certificate his name is used.

We think the variance immaterial under the circumstances, and that the name of Rose is a clerical error. The commissioner certifies that

Cain v. Loeb.

the answers are those of L. B. Cain, sworn to and signed by him in the presence of the commissioner, and were correctly written down. The form is not sacramental, and it is sufficient if it appear in the return when, where and by what authority the deposition of the particular witness was taken, and this appears in this instance. The deposition should have been received.

A second bill was taken by plaintiff to the exclusion of the deposition of E. L. Golson for want of a legal order of court, the parish judge not being authorized under the affidavit to grant the order of the district judge.

There was an affidavit that the district judge was absent from the parish, which is sufficient under the law.

A third bill was taken to the exclusion of six letters of the defendant on the ground that there was not sufficient proof of their genuineness before being offered.

We think the proof sufficient. The witness Rose stated positively that they were in the handwriting of the defendant and signed by him, and had reference to the indebtedness of the defendant to the plaintiff.

With this evidence, which comes up in the record, the plaintiff has fully made out his case and taken it out of the prescription pleaded.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of defendant \$3735 16, with five per cent. interest from first January, 1868, less five hundred dollars paid on sixteenth February, 1870, and costs in both courts.

Rehearing refused.

No. 848.

THOMAS B. STEVENS v. ED. F. PINNEO et als.

When the act of sale contains the pact *de non alienando*, no matter through how many hands the property sold has passed, so long as the price agreed to be paid remains due, the vendor has the right to proceed directly against the vendee, regardless as to who is in possession of the mortgaged premises.

The fact that the property was not divided into lots of fifty acres or less according to article 132 of the constitution, is not sufficient cause for annulling the sale on the relation of the plaintiff, who complains of the illegality of the executory proceeding under which it took place.

A PPEAL from the Third Judicial District Court, parish of Iberia.
Train, J. DeBlanc & Fournet, for plaintiff and appellant. Shwing & Haase, Lewis & Bro., for defendants and appellees.

MORGAN, J. The object of this action is to annul a sale of real estate made by the sheriff in virtue of an order of court issued in an executory proceeding.

The exception of no cause of action can not be maintained. If

plaintiff's property was illegally sold he has the right to have the illegality declared.

Broussard sold to Marsh a certain piece of property. To secure the credit price he reserved the vendor's privilege and a mortgage, the act of sale and mortgage containing the pact *de non alienando*.

Marsh sold the property to Pinneo. Pinneo sold the one half thereof to Thomas B. Stevens, the plaintiff. On the seventeenth of July, 1872 Broussard instituted executory process against Marsh upon a portion of the price remaining due on account of his purchase, and, under execution the property was sold to Broussard, who, in his turn, sold it to Pinneo. Stevens says he was absent at the time of the sale.

He seeks to annul the sale on various grounds :

First—Because he was never notified of the order under which the property was sold, though the party obtaining the order, and the parties purchasing under it, knew him to be the owner of one-half thereof.

The answer to this is that the act of sale from Broussard to Marsh contained the pact *de non alienando*. No matter through how many hands the property had passed, so long as the price agreed to be paid by Marsh remained due, Broussard had the right to proceed directly against Marsh, regardless as to who was in possession of the mortgaged premises.

Second—Because the order was granted against Marsh who was not the owner of the property. The answer we gave to the second objection answers this one.

Third—Because the property was not divided into lots of fifty acres or less, according to article 132 of the constitution. This is not sufficient cause for annulling the sale on the relation of Stevens.

Fourth—Because every formality prescribed by our laws for the enforcement of contracts, mortgages and privileges for the seizure and sale under execution of the debtor or third possessors of property have been disregarded and ignored by those who obtained and those who executed the order of seizure and sale under which the property in question was sold. This objection is so general that it amounts to nothing.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
MONROE.

JULY, 1874,

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	} <i>Associate Justices.</i>
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. P. H. MORGAN.	

No. 444.

DAVID BOWEN, Guardian, v. F. R. CALLAWAY, Tutor.

The parish court having made the appointment of tutor, and having jurisdiction of the tutor's administration, is the proper tribunal in which the tutor should be called on to account for and deliver the property of the minor to a legal representative of said minor.

The plaintiff, having satisfactorily exhibited evidence of his appointment as guardian of a minor in the State of Georgia, is entitled to sue for and recover the property in this State belonging to his ward.

The appointment of the defendant as tutor, contradictorily with and on the opposition of plaintiff's predecessor, did not conclude such predecessor, or the plaintiff, his successor, from asserting the right set up in this action, which is different from that involved in the former contest; nor was it necessary for the plaintiff to show before instituting this suit that no debts existed against the minor. Protection is provided in this respect by the Code.

A PPEAL from the Parish Court, parish of Webster. *Taylor, J. Watkins & Fort*, for plaintiff and appellant. *L. B. Watkins*, for defendant and appellee.

HOWELL, J. The plaintiff, a resident of Terrell county, Georgia, representing himself as the legally appointed guardian of the minor, James A. G. Roby, sues the tutor of said minor in Webster parish for the funds and property in his hands belonging to the said minor, to be recognized as guardian and for authority to remove the property upon complying with article 364 R. C. C. The defendant excepts:

First—To the jurisdiction of the parish court, the amount claimed being over five hundred dollars, and the matter not being probate;

Second—That plaintiff is not legally appointed the guardian, and the ordinary of Terrell county, Georgia, had no jurisdiction to make such appointment.

Third—That plaintiff has judicially declared defendant to be the tutor, and has shown no cause of action while such tutorship exists.

Fourth—That defendant was appointed tutor contradictorily with plaintiff's predecessor, who then assumed the same quality, which he pleads as *res judicata*.

Fifth—That previous to the institution of this suit plaintiff did not make proof that there were no debts against the minor.

Sixth—That the succession of the minor's father and the accounts of the defendant, as tutor, to the latter of which plaintiff has filed an opposition, are not settled.

The judge *a quo* maintained his jurisdiction, but dismissed the suit on the ground that plaintiff's appointment was a nullity, that of the defendant being operative. In our opinion he did not err in maintaining his jurisdiction; the parish court having made the appointment of tutor, and having jurisdiction of the tutor's administration, is the proper tribunal in which the tutor should be called on to account for and deliver the property of the minor to a legal representative of said minor. But we think the judge erred in dismissing the action upon any of the exceptions filed.

The plaintiff has exhibited satisfactory evidence of his appointment as guardian of the minor in the State of Georgia, whither his mother had removed with him after his father's death in this State, and where she contracted a second marriage and afterwards died, and under the terms of article 363 R. C. C., the plaintiff is entitled to sue for and recover the property in this State belonging to his ward. See 4 An. 523.

The appointment of the defendant as tutor, contradictorily with and on the opposition of plaintiff's predecessor, did not conclude such predecessor or the plaintiff, his successor, from asserting the right set up in this action, which is different from that involved in the former contest. Nor is it necessary for the plaintiff to show, before instituting this action, that no debts exist against the minor. Protection is provided in this respect by the Code. The exceptions seem to have been treated as an answer, and evidence introduced to show the condition of the minor's estate in the hands of the defendant, from which it appears that the succession of the father has been fully administered; that the defendant owes the minor \$4813 89 on his final account, and that the items of property in the hands of the defendant, belonging to the said minor, are properly described in plaintiff's petition.

It is therefore ordered that the judgment appealed from be reversed and that the plaintiff, David Bowen, of Georgia, be recognized as the

Bowen v. Callaway.

guardian of James A. G. Roby, and that defendant pay over to him the sum of \$4813 89, with five per cent. interest from fourteenth August, 1873, and deliver to him the property described in plaintiff's petition as belonging to said minor, and in his, defendant's hands, upon plaintiff's making proof as required by article 364 R. C. C., that the debts of the minor are paid, after which the said plaintiff shall be authorized to remove said funds and property of said minor from this State. It is further ordered that the defendant pay costs in both courts.

Rehearing refused.

No. 498.

GOODWELL & WEBB v. A. F. MINCHEW.

The attachment in this case was improperly dissolved. The defendant having been sued on an undisputed debt, transferred his plantation upon which he was living, in the fall, before gathering a growing crop, and just as a judgment by default was about to be made final. He transferred it in part payment of a debt due another creditor, and though he received cash enough to discharge the debt sued upon, he failed and refused to apply any part of the money to the payment of the debt; and shortly after this transfer he removed to Texas. These acts authorize the belief that he transferred his property with a fraudulent intent, and justified the attachment.

APPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J. L. B. Watkins, Watkins & Fort*, for plaintiff and appellant. *A. B. George, J. A. Snider*, for defendant and appellee.

LUDELING, C. J. On the fifth of November, 1873, the plaintiffs instituted this suit on a promissory note against the defendant. On the eighteenth day of November, 1873, a default was taken. On the twentieth day of the same month and during the term of the court, the defendant transferred his property to another creditor for about \$1600 cash, in part payment of a debt due to him and for two notes due in one and two years. On the twenty-first day of November, the day after this sale, the plaintiffs filed an amended petition praying for an attachment, on the grounds that defendant had sold a part of his property, and they feared and believed he was about to sell the balance thereof, with the intent to give an undue preference to one creditor over another and to defraud the plaintiffs.

The defendant moved to dissolve the attachment on the grounds that the amount of the debt is not sworn to; that the affidavit is made by the attorney, and he swears not to facts within his knowledge but according to the best of his knowledge and belief; and that the allegations in the amended petition are not true. The attachment was dissolved with damages against plaintiffs; judgment was rendered in their favor for the debt.

We think the attachment was improperly dissolved. The amount of the debt was sworn to and the affidavit of the attorney substantially

embraced all the requirements of the law. C. P. 216, 217. The last objection relates to the merits, and we think the evidence shows that the allegations in the amended petition are true.

As already stated the defendant, having been sued on an undisputed debt, transferred his plantation upon which he was living, in the fall, before gathering a growing crop, and just as a judgment by default was about to be made final. He transferred it in part payment of a debt due another creditor, and though he received cash enough to discharge the debt sued upon, he failed and refused to apply any part of this money to the payment of the debt; and shortly after this transfer he removed to Texas.

We think these acts of the defendant justify the opinion that he transferred his property with a fraudulent intent and justified the attachment.

It is therefore ordered that the judgment dissolving the attachment with damages be annulled, and that there be judgment reinstating and recognizing the attachment and ordering the property attached to be sold according to law to satisfy the judgment for the debt in favor of the plaintiffs against the defendant, which is affirmed with costs of appeal.

No. 515.

THE STATE OF LOUISIANA v. ELI GILCREASE.

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The verbal admissions of the accused ought always to be received with great caution. Besides, it is a rule of evidence that the whole admission is to be taken together. In this case the witness only heard part of it. The evidence should have been rejected.

A PPEAL from the Twelfth Judicial District Court, parish of Winn. *Taliaferro, J.* Criminal case. *D. B. Gorham*, district attorney, for the State, appellee. *S. M. Bryan* and *George Wear*, for defendant and appellant.

LUDELING, C. J. The defendant is charged with the murder of his infant child. He was convicted of manslaughter and sentenced to imprisonment at hard labor for three years.

During the course of the trial a bill of exceptions was taken to the admission of testimony to prove a portion of a conversation of the prisoner overheard by the witness. The objection urged was that the admissions or confessions of the defendant were inadmissible unless the whole thereof was given. From the bill of exceptions it appears that the witness was walking through the yard of the accused, and as she approached the house she heard him talking to his wife; and that as she reached the steps of the house she distinguished these words: "Now don't you never tell that I whipped the child Friday." On dis-

covering witness, the accused stopped speaking, and she did not hear what preceded this sentence.

We think this evidence should have been rejected. Verbal admissions ought always to be received with great caution. Mr. Greenleaf says: "The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally uttering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say." § 200. Besides, it is a rule of evidence that the whole admission is to be taken together. Here the witness only heard a part of it. Greenleaf 1 § 201.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the court *a qua* be annulled, and that the case be remanded to be proceeded with according to law.

No. 517.

ANGELINE RENTZ et als. v. RICHARD COLE.

The plaintiffs, as heirs of the deceased wife of the defendant, alleging that he failed to open her succession, or cause an inventory thereof, consisting of half of the community property, to be made, but has administered the same as *negotiorum gestor* and permitted it to be wasted and dilapidated, obtained an *ex parte* order directing him to file an account of his administration and a notary public to make an inventory of said succession.

There is no authority for calling on a *negotiorum gestor*, in this manner, to render an account to the court in a fiduciary capacity, as an administrator of a succession; nor is the surviving husband, holding under the law as usufructuary, to be called on thus for an account of an administration.

APPEAL from the Parish Court, parish of Winn. *Kelly, J. Jack & Pierson, S. M. Brian*, for plaintiffs and appellees. *Hough & Wear*, for defendant and appellant.

HOWELL, J. A motion is made to dismiss this appeal on the grounds that there is no order of appeal, and the certificate of the clerk is vague, indefinite and insufficient, and no return day is fixed.

The entry as to an order of appeal, as indeed the whole record, is irregular and very inartistic, and if we were to determine to act strictly in this respect, we would require the clerk to make out a new transcript without cost to the parties; but we think it sufficiently clear that an order of appeal was granted. The other grounds are not good in law for a dismissal, and we do not consider them of sufficient importance to require their correction. The motion is therefore refused.

The plaintiffs, as heirs of the deceased wife of the defendant, alleged

that he failed to open her succession, or cause an inventory thereof, consisting of half the community property, to be made, but has administered the same as *negotiorum gestor* and permitted it to waste and be dilapidated, obtained an *ex parte* order directing him to file an account of his administration and a notary public to make an inventory of said succession.

The defendant filed a motion to revoke said order and dismiss the suit on the grounds, substantially:

First—That plaintiffs do not show that he is administering in such capacity as to render an account.

Second—At the time the order was granted there was no proof before the judge on which to base it.

Third—Defendant is not sufficiently notified of the demand against him to enable him to make his defense.

This motion, which may be viewed as really an exception, was overruled, and proceedings were had to a judgment on oppositions to an account, from which the defendant has appealed.

We think the motion should have prevailed. There is no authority for calling on a *negotiorum gestor*, in this manner, to render an account to the court in a fiduciary capacity, as an administrator of a succession; nor is the surviving husband, holding under the law as usufructuary, to be called on thus for an account of an administration.

It is therefore ordered that the judgment appealed from be reversed, and that the action of plaintiffs be dismissed with costs in both courts.

No. 448.

THOMAS B. KILGORE. v. JOHN L. TIPPIT et als.

The defendants are sued as sureties, bound *in solido*, which they deny. After the case had been tried and submitted, but before judgment the defendants offered to file the plea of division. This was objected to on the grounds that it came too late, and that many of the co-sureties were then insolvent. The plea was properly refused by the judge *a quo*. Division is a right accorded to sureties, but they can not claim this benefit while denying their obligation as surety; the plea is inconsistent. The obligation sued upon in this instance is manifestly one of suretyship, and solidarity is of the nature of that contract.

A PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. Egan & Hayes* for plaintiff and appellee. *J. & J. W. Young*, for defendants and appellants.

LUDELING, C. J. The defendants are sued as sureties on the following written obligation:

“We, the undersigned stockholders of the Claiborne Manufacturing Company hereby bind ourselves to Merrill Monk, Sr., in consideration of his lending said company twenty-eight hundred dollars in gold, that the note given for said sum this day by John L. Tippit, president

Kilgore v. Tippit et als.

of said company, payable to Merrill Monk, Sr., on the first day of December, 1868, in gold, with eight per cent. per annum interest from date, until paid, shall be paid according to its face in gold, and also pledge our honors as men thereto.

J. L. TIPPIT,
JOSHUA WILLIS,
H. W. PATTON,
JOHN L. WILLIAMS,
JAMES F. NELSON,
WILLIAM MUNLEY,
J. S. BURHAM,
G. C. BAKER,
J. F. FESTION,
J. F. SCAIFFE."

They deny their liability, *in solido*, or that they are sureties.

After the case had been tried and submitted, but before judgment the defendants offered to file the plea of division. This was objected to on the grounds that it came too late, and that many of the co-sureties were then insolvent. The judge *a quo* refused the plea properly.

Division is a right accorded to sureties. C. C. 3049. But they can not claim this benefit while denying their obligation as surety. The plea is inconsistent with their answer denying their liability. Pothier says: "Enfin les lois refusent l'exception de division aux cautions qui ont commencé par dénier de mauvaise foi leur cautionnement." Vol. 1, p. 403, §417.

The obligation sued upon is manifestly one of suretyship; and solidarity is of the nature of that contract. Pothier vol 1, p. 402, §416.

It is therefore ordered and adjudged that the judgment be affirmed with costs of appeal.

No. 460.

A. B. AND N. B. THOMAS v. HENRY FULLER. JAMES C. COOPER, Garnishee.

Cooper the garnishee in this case answered the interrogatories, acknowledging his indebtedness to Fuller, the defendant, and some time afterwards he filed another set of answers the effect of which is to release himself from any judgment in this suit. This can not be allowed. The object of such interrogatories is to elicit the truth, and ample opportunity is afforded to the person interrogated to answer clearly, fully and unequivocally; If he does not properly avail himself of such opportunity, it is his own fault.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. Todd & Brigham, for plaintiffs and appellees. S. G. Parsons, for defendant and appellant.

LUDELING, C. J. This is a suit for the price of a tract of land. The defendant, being a non-resident, an attachment was obtained, and Cooper and others were garnisheed.

Judgment for the price of the land and against the garnishee, Cooper, was correctly rendered. It appears that Cooper answered the interrogatories acknowledging his indebtedness to Fuller, and some time afterwards he filed another set of answers, the effect of which is to release himself from any judgment in this suit. This can not be allowed.

"The object of such interrogatories is to elicit the truth, and ample opportunity is afforded to the person interrogated to answer clearly, fully, unequivocally. If he does not properly avail himself of such opportunity it is his own fault. A practice once admitted of allowing suitors to amend their affidavits *ad libitum* would probably induce inconvenience and delays, and in many instances perjury." 5 La. 83; 19 An. 374.

The appellee has asked for damages for a frivolous appeal, but he has waived that right by asking for an amendment of the judgment, although the amendment is refused.

It is ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 478.

N. B. ADAMS v. B. H. DINKGRAVE et als.

The sheriff of a different parish from the one in which the suit is instituted is not required by law to serve civil process in his own parish, which has emanated from the parish where the suit was instituted, without being paid in advance the fees established by law for such service.

Section 7 of the act of 1870, p. 165 (Ray's Revised Statutes, p. 369, section 17,) applies only to the sheriff and clerks of the parishes in which the suits are instituted.

In this case it is not found in the record that the defendant, sheriff of the parish of Ouachita, was informed of the near approach of the period which was to extinguish plaintiff's claim by prescription, nor that the plaintiff used that degree of diligence which would naturally be expected from men of prudence and caution to avoid a heavy loss.

Without leaving out of view the important fact that public officers should be held strictly responsible for injuries or loss that may arise from a refusal or culpable neglect to perform their duties, this court must advert to the want of right in litigants to require their services without reasonable assurance of the payment of the fees allowed them by law, and without subjecting them to delay or inconvenience in receiving the same.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J.* Jury trial. *T. S. Sawyer, Cobb & Gunby*, for plaintiff and appellant. *Morrison & Farmer*, for defendant appellee.

TALIAFERRO, J. This is an action upon a sheriff's bond against the sheriff and his sureties to make them liable *in solido* to the plaintiff in the sum of two thousand dollars for an alleged gross and culpable failure and neglect on the part of the sheriff to serve certain process on a party residing in the parish of Ouachita, in a suit instituted against him in the parish of Tensas by the plain-

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tiff. The plaintiff complains that having brought suit in the last named parish against one James Bowman on three mortgage notes, praying judgment thereon with recognition of mortgage, he caused a deposit of ten dollars to be made, and a duly certified copy of the petition and amended petition in that case together with citation and copy of the same according to law, to be procured and sent by mail through his attorney residing at Vidalia, parish of Concordia, to the defendant at Monroe, La., with special instructions to him to have service of the papers made immediately upon Bowman who is a resident of the parish of Ouachita, and to forward his fee bill for services to C. W. Allen, of New Orleans, a merchant there, for payment; that the sheriff refused and neglected to serve the papers thus sent to him and in consequence of this failure to perform his duties required of him by law, the last note of the series became prescribed by the lapse of five years from its maturity, whereby a loss of two thousand dollars with eight per cent. per annum interest from the fifteenth of March, 1857, resulted to the plaintiff.

The answer of the defendant sets up various defenses. He avers that the law provides how the fees of sheriffs are to be secured and paid; that the defendant can not be required to serve judicial documents and send his fee bill to any individual whomsoever for payment; that the plaintiff's petition discloses the fact that no sufficient legal steps were taken by the plaintiff to place defendant in default so as to be enabled to compel him to serve judicial documents; that a sheriff can not be compelled to serve such documents unless money, cash in hand, is actually deposited according to the provisions of law, so that out of such actual cash deposit the sheriff can receive his fees in money when he makes return of service. He alleges that when a litigant requires such service of a sheriff and requires him besides to undergo the risk, inconvenience and exposure of obtaining his fees from some private party, he proposes simply an ordinary private contract to the sheriff which the latter may reject without further consideration and without notice of the rejection of the proposition to the proposer. The defendant denies generally all the allegations of the petition.

The case was tried before a jury.

Judgment was rendered in favor of the defendant and the plaintiff appeals.

There is a motion to dismiss this appeal on the ground that the record does not contain all the evidence introduced on the trial of the case in the court below. We find that the evidence omitted, if it were in the record, would be of no effect in favor of either of the parties in the decision of the case and therefore overrule the motion to dismiss.

There are several bills of exception in the record, but we do not consider it necessary in the decision of this case to examine them.

The principal inquiry in this case appears to be: can a sheriff of a different parish from the one in which the suit is instituted, be required by law to serve civil process in his own parish which has emanated from the parish where the suit was instituted, without being paid in advance the fees established by law for such service? Section 7 of act of 1870, page 165 (Rays Revised Statutes, page 369, section 17), is relied upon by plaintiff to show that the sheriff is not entitled to receive fees in advance for his services.

The law referred to provides that a party about to institute a suit shall deposit with the clerk ten dollars if the suit is brought in the district court and five dollars if brought in the parish court, to be held by the clerk to pay the costs of the clerk and sheriff in such cases, the clerk retaining one half and the other half to be paid over to the sheriff as fast as his fees accrue until the amount to which he is entitled is exhausted," etc.

This law, the defendants contend, applies only to the sheriff and clerks of the parishes in which the suits are instituted. This construction we think correct. No provision of the kind is made for clerks and sheriffs of other parishes than those in which the suit is filed when the latter are required to serve process emanating from other parishes. In the case at bar ten dollars were deposited with the clerk of the parish of Tensas, when the plaintiff's suit was filed in that parish against Bowman. That deposit was for the fees of the clerk and sheriff of that parish. The sheriff of the parish of Ouachita would have no right to claim to be paid out of that fund for services rendered in the parish of Ouachita.

One object certainly in the enactment of the statute in question was to insure the payment of clerk's and sheriff's fees in the parishes where they reside, and perform their official duties, and to relieve them from the trouble and annoyance often amounting to a loss of their fees, by having to collect them as best they may from irresponsible persons or persons residing in distant parishes.

No deposit of money for costs in the parish of Ouachita was made in this case. On the contrary, the plaintiff's attorney had no expectation of the fees of the sheriff of Ouachita being paid out of the ten dollars he deposited in the parish of Tensas, for he directed that sheriff to send his bill of fees to be paid by a merchant in New Orleans. The sheriff of the parish of Tensas could not have been required to render services in the case unless secured by a deposit of the sum of money required by law. Was the sheriff of Ouachita, for services to be rendered by him in the same case, placed *in durior casu*? We do not find

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in the record that the sheriff of the parish of Ouachita was informed of the near approach of the period which was to extinguish the plaintiff's claim by prescription, nor that the plaintiff or his attorney used on this occasion, that degree of diligence which would naturally be expected from men of prudence and caution to avoid a heavy loss. In the case of *Bloomfield v. Jones et al.*, 2 An. p. 936, and in *Sandridge & Co. v. Jones, et al.*, 2 An. p. 933, and also in *Anderson v. Joliet* 14 An. 615, this court has placed some stress on cases of this kind upon the fact of whether or not the officer was notified that dispatch was necessary in the execution of the process to prevent impending loss by prescription or otherwise.

Without leaving out of view the important fact that public officers should be held strictly responsible for injuries or loss that may arise from a refusal or culpable neglect to perform their duties, we must advert to the want of right in litigants to require their services without reasonable assurance of the payment of the fees allowed them by law, and that without subjecting them to delay or inconvenience in receiving them. From a careful examination of this case, we conclude that the decree of the lower court should be maintained.

Mr. Chief Justice Ludeling recused.

Judgment affirmed.

Rehearing refused.

No. 501.

JOHN N. COLEMAN v. JOHN J. HOPE.

The defendant, ex-sheriff, having turned over all the papers, writs, etc., of his office, including the receipts of the keepers of the property attached, to his successor, without objection, while the attachment writs were pending and long before this and the other plaintiffs had obtained judgment, and the incoming sheriff having accepted the keepers of said property and made them his own, the defendant (out-going sheriff) is, under such circumstances, released from responsibility for its safe keeping.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Land & Taylor*, for plaintiff and appellant. *Nutt & Leonard*, for defendant and appellee.

HOWELL, J. In July 1868, the plaintiff instituted suit by attachment against the old Southern Pacific Railroad Company, and caused certain property to be attached and taken into the possession of the defendant herein, who was then sheriff of Caddo parish. In February 1871, judgment was rendered in said suit in favor of the plaintiff with privilege upon the property attached, on which execution issued and demand was made by the present sheriff on the defendant for delivery of said property, and upon his failure to comply, this suit was instituted to recover the amount of the judgment and costs in the first suit.

Coleman v. Hope.

The defendant pleaded the prescription of one, two and three years, and answered, besides the general denial, that the property attached in the said suit of the plaintiff had been long before attached in those suits against the same company, and the plaintiffs therein have a preference over this plaintiff for an amount largely exceeding the value of the property; that said property is not worth over two hundred dollars; that it was, when attached, put in the charge of competent and trustworthy keepers, in whose hands it remained until defendant went out of office in April 1869, when he turned over all the papers, writs, etc., of his office to his successor, and he has since had no control of the said property and is not responsible therefor, but if held responsible he claims the keepers' fees.

From a judgment in favor of defendant plaintiff has appealed.

We think, under the circumstances of this case, the court *a qua* did not err. When the defendant turned over all the papers, writs, etc., of his office, including the receipts of the keepers of this property, to his successor, without objection, while the attachment suits were pending, and long before this and the other plaintiffs had obtained judgment, the successor, the in-coming sheriff, accepted the keepers of said property and made them his own, and hence the defendant, the outgoing sheriff, was released from responsibility for its safe keeping.

Judgment affirmed.

Rehearing refused.

No. 501.

A. L. GERVIN v. J. H. BEAIRD.

The defendant is bound by the pleadings he filed through his counsel. Without disavowing the authority of the pleadings, he can not come into court, two years after he has raised the issue of payment, which admits the debt, and shift his defense by setting up an inconsistent plea—a denial of the indebtedness.

A litigant will not be permitted to shift his position in order to escape the consequences of his solemn judicial admissions standing on the record for nearly two years.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Land & Taylor*, for plaintiff and appellant. *Egan & Wise*, for defendant and appellee.

WYLY, J. This case presents a question of practice. The plaintiff sued the defendant on an account, and citation was served personally on the twelfth of February, 1872. On the twenty-seventh of April, 1872, the defendant answered, pleading payment. On the ninth of April, 1874, nearly two years after issue joined, the defendant filed the following motion:

“Now comes the defendant and moves the court for leave to withdraw the original answer filed in this case, and to substitute therefor

Gervin v. Beard.

averments which he now makes, that he is in no manner indebted to the plaintiff, as alleged, and that he so informed his attorneys and instructed them so to plead; avers the answer already filed was without his knowledge and filed by his attorney through haste and inadvertence, and that he should not be bound or prejudiced thereby, and in support of this application presents the affidavits of his attorney."

The motion was sustained by the court, and the plaintiff took a bill of exceptions.

We think the court erred. The defendant is bound by the pleadings he pleaded through his counsel. Without disavowing their authority, he can not come in two years after he has raised the issue of payment, which admits the debt, and shift his defense by setting up an inconsistent plea, a denial of the indebtedness. If he did not instruct his counsel to plead payment, how did they know that there was such a defense?

A litigant will not be permitted to shift his position, as was attempted in this case, in order to escape the consequences of his solemn judicial admissions standing on the record for nearly two years. The defendant has failed to prove the allegation of payment.

It is therefore ordered that the judgment herein, in favor of defendant, be annulled, and it is ordered that plaintiff recover of the defendant thirteen hundred and fifty-three dollars, with legal interest thereon from the twelfth of February, 1872, and costs of both courts.

Rehearing refused.

No. 454.

STATE ex rel. L. A. CORMICK v. S. R. RICHARDSON.

In this suit under the intrusion into office act, the clear explicit language of the twelfth section of the act of the Legislature of the twenty-first of March, 1874, declaring that the mayor of the town of Homer shall receive a salary of five hundred dollars a year with no other fees or emoluments of office, and the other portion of said statute authorizing the mayor to act as justice of the peace, can not, under the allegation that as justice of the peace he is entitled to fees, be so construed as to give jurisdiction of the case to the district court.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble J. Egan & Hays*, for relator and appellant. *J. & J. W. Young*, for respondent and appellee.

TALIAFERRO, J. This is a suit brought under the intrusion into office act. It was dismissed by the court below for want of jurisdiction, on the ground that the matter in dispute does not exceed five hundred dollars. The contest is for the mayoralty of the town of Homer. By section twelve of the act of the Legislature of the twenty-first of March, 1874, the salary of the mayor is fixed at "five hundred

State ex rel. Cormick v. Richardson.

dollars and no more, with no other fees or emoluments of office." By this act the mayor is authorized to act as justice of the peace, and on the part of the relator it is argued that in that capacity he would be entitled to fees for services rendered, the amount of his salary and fees as justice of the peace would exceed five hundred dollars, the petition alleging the office to be worth seven hundred and fifty dollars. This construction we think can not be maintained against the clear explicit language used in declaring that the mayor shall receive a salary of five hundred dollars a year, with no other emoluments of office.

Judgment affirmed.

26	632
45	855

No. 476.

MRS. SARAH RICHARDSON v. B. H. DINKGRAVE, Sheriff, et al.

The Ingleside plantation was seized and sold in the suit of Pargoud v. Mrs. Richardson. Pargoud became the purchaser. The seizure was not released, neither did Mrs. Richardson leave the plantation which is situated within a short distance of the residence of the sheriff and Pargoud. She cultivated the land and made thereon a crop of cotton and corn with her own means, except three hundred dollars, which the sheriff paid to the hands and which were returned to him. After she had removed some of the cotton, she was enjoined from taking any thing more off the place.

The injunction was properly dissolved. It is impossible, under the circumstances, for Pargoud and Dinkgrave not to have known that she was cultivating the plantation. There is neither law nor justice in depriving her of what she made.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee. *S. P. McEnery, Cobb & Gunby*, for defendants and appellants.

MORGAN, J. The Ingleside plantation was seized in the suit of Pargoud v. Richardson on the fourteenth February, 1873. Mrs. Richardson enjoined the sale. The injunction was dissolved, and on the seventh February, 1874, it was sold and Pargoud became the purchaser.

The seizure in the suit of Pargoud v. Richardson was not released; neither did Mrs. Richardson leave the plantation. The plantation is situated within a short distance of the residence of the sheriff and Pargoud. She cultivated the land and made thereon a crop of cotton and corn with her own means, except three hundred dollars, which the sheriff paid to the hands and which were returned to him.

After she had removed some of the cotton she was enjoined from taking anything more off the place.

The injunction was properly dissolved. It is impossible, under the circumstances, for Pargoud and Dinkgrave not to have known that she was cultivating the plantation. We think there is neither law nor justice in depriving her of what she made.

Judgment affirmed.

Mrs. Sarah Richardson v. Dinkgrave, Sheriff, et al.

LUDELING, C. J., *dissenting*. In this case I dissent on the grounds, that the sheriff, who had under seizure the property of the plaintiff, had the right to prevent the plaintiff from removing from the place under seizure any of the cotton or corn hanging by the root on the place, whether the plaintiff be regarded as a lessee, as *negotiorum gestor*, or as a trespasser. If she be regarded as lessee, the rents must be paid before the crops could be removed; if she be *negotiorum gestor* or a trespasser, all she could demand was the expenses for making the crop.

Under the textual provisions of the Code, the growing crops, hanging by the roots, form part of the realty, and therefore must be recognized as under seizure with the plantation, and under the control of the officer who made the seizure.

HOWELL, J. I concur in the above dissenting opinion.

Rehearing refused.

No. 447.

THOMAS B. KILLGORE v. M. P. NICHOLSON et als.

If the Claiborne Manufacturing Company was insolvent when Nicholson, one of the defendants, obtained his judgment, which is now sought to be annulled, it does not appear that he knew it. Had he known it, there was no reason why he should not have prosecuted his claim. The board of directors had expressly authorized the president of the company to confess judgment in Nicholson's favor. This they had the authority in law to do.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. Egan & Hayes*, for plaintiff and appellee. *J. & J. W. Young*, for defendant and appellant.

MORGAN, J. On the thirteenth January, 1870, Josiah Barron, as President of the Claiborne Manufacturing Company, executed his promissory note in favor of M. T. Nicholson for \$684 86, payable one day after date.

In October, 1872, Nicholson instituted suit against the company to recover the amount of this note, and the president thereof, on the fifteenth October, 1872, accepted service of the petition, waived legal service, citation and time, and confessed judgment as claimed.

On the twenty-second October, 1872, judgment was rendered upon this confession in Nicholson's favor.

On the twentieth May, 1873, Killgore, the present plaintiff, alleging himself to be a stockholder in the Claiborne Manufacturing Company, and a creditor thereof, and alleging that the defendant, Nicholson, had obtained the judgment above referred to; that at the time the judgment was rendered the corporation was insolvent, to the knowledge of the president thereof, as well as to Nicholson, who is the president's

Kilgore v. Nicholson et al.

son-in-law, and who both knew that the judgment would be a legal fraud upon the plaintiff and the other creditors of the corporation, thereby giving to Nicholson a judicial mortgage and privilege over the other creditors of the corporation; alleging further that the president was entirely without authority to confess judgment and bind the corporation, and that therefore the act of the president, not being the act of the corporation, was not binding thereon; alleging further that the note sued on by Nicholson was in reality the property of Joshua Willis, the president; and finally alleging that Nicholson had issued a *fiery facias* upon his judgment, asked for and obtained an injunction prohibiting him from executing the same, and also prayed that the judgment obtained by Nicholson be declared null and void.

The injunction issued as prayed for. After hearing it was made perpetual, and the judgment was annulled. Nicholson has appealed.

The evidence does not, in our opinion, sustain the judgment. If the company was insolvent when Nicholson obtained his judgment, it does not appear that he knew it. Even if he had known it, there was no reason why he should not have prosecuted his claim. There is no evidence that the president of the company was the true plaintiff in the case, and the board of directors expressly authorized him to confess judgment in Nicholson's favor. This they had the authority in law to do.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the injunction herein granted be dissolved, the costs to be paid by appellees.

No. 502.

FRANK STEVENS v. OLDER & CHANDLER. P. T. BARNUM & Co. Interveners.

Older & Chandler, the defendants in this case, were not the owners of the property attached. The document relied upon to establish their ownership is not an unconditional sale. It was a mere agreement that whenever they should pay a certain amount of money, the property should be transferred. In the meanwhile the property belonged to Barnum & Co., and was hired by them to Older & Chandler, and was not liable to be seized to pay the debts of the latter.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Nutt & Leonard, N. O. Blanchard*, for plaintiff and appellee. *T. Alexander and A. N. O. Hicks*, for intervenors and appellants.

MORGAN, J. On the twenty-third January, 1873, P. T. Barnum & Co., owners of a museum, menagerie and circus, then in Algiers, Louisiana, agreed to rent their show to Older & Chandler, giving to them the right to purchase the same, and Older & Chandler agreed to

26 634
48 1495

26	634
121	168

purchase it. The price of the show was fixed at \$50,000, and the rental thereof it was agreed should be seven per cent. per annum on that valuation, commencing from the first January, 1873, Barnum & Co. agreeing to assist Older & Chandler to equip and place the show on the road if necessary, and to advance them \$5000 for that purpose.

All the receipts of the show over and above its daily expenses, and a reserve of \$2000, to be kept in the treasury in case of emergency, was to be remitted daily to P. T. Barnum & Co. The funds thus remitted were to be applied, first, to the repayment of whatever money might have been advanced for equipping the show; second, to the rental of the show, and, third, to the purchase thereof. When the last named sum should have amounted to \$50,000, Barnum & Co. agreed that they would convey the entire property to Older & Chandler. It was further agreed that the name of Barnum should not be used on any bill, wagon or other property of the circus. Barnum & Co. reserved the right to take the rhinoceros at \$7000 in case the one they then had in New York should die.

Under this agreement the company started on its travels. When it reached Shreveport its affairs seem to have been in a bad condition. The plaintiff, one of the employees, sued them. As they were non-residents, he proceeded by attachment. The property which comprised the show was attached. It was subsequently sold. Barnum & Co. intervened, asserted their right to the property, claimed the proceeds of the sale, and asked for damages in the sum of \$10,000 and special damage as counsel fees for \$500.

There was judgment in favor of the plaintiff and against the defendants, with privilege on the property attached, and dismissing the intervention and third opposition. Barnum & Co. appeal.

Older & Chandler were not the owners of the property attached. The document relied upon to establish their ownership is not an unconditional sale. It was a mere agreement that whenever they should pay a certain amount of money the property should be transferred. In the meanwhile the property belonged to Barnum & Co., and was hired by them to Older & Chandler, and was not liable to be seized to pay their debts.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, in so far as it dismisses the intervention of P. T. Barnum & Co.; that said intervention be maintained, and the proceeds of the sale of the property attached herein be paid over to them, P. T. Barnum & Co., and that the right of the said P. T. Barnum & Co. to proceed for damages on the attachment bond be reserved; plaintiff to pay costs in both courts.

Rehearing refused.

Edey v. City of Shreveport.

No. 507.

C. C. EDEY v. CITY OF SHREVEPORT. GREGG & FORD v. The same. STEERS & CARLTON v. Same. S. B. STEERS v. Same. W. JOHNSTON & Co. v. Same. Consolidated cases.

The City Council of the city of Shreveport having under its charter the right to purchase property, had the right to secure the credit portion of the price by stipulating a mortgage and the vendor's privilege on the property purchased in favor of each vendor and agreeing not to prejudice the right of mortgage and privilege by any alienation or incumbrance, and to pay the costs or fees incurred by the vendors in enforcing their rights thus preserved. These were all incidents of the contract of sale.

The very fact that the city purchased the property for the purpose of donating it to the Texas and Pacific Railroad Company for their *depots*, made it the more prudent in the vendors to require the pact *de non alienando*, and militates against the presumption of their consenting to waive it.

If there could be any doubt about the authority of the mayor to represent the city in these sales, and to make the stipulations referred to, his acts were ratified by the acceptance of the transfers and the donation of the purchased property to the railroad company, in which the several acts of sale were referred to.

The attempted exclusion in this act of donation, of any intention to ratify the onerous stipulations under consideration, was without effect against the vendors. The contract of sale as a whole was ratified.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. N. C. Blanchard, T. Alexander, for plaintiffs and appellees. Egan & Wise, for defendant and appellant.

HOWELL, J. The plaintiffs in these several cases are seeking, *via ordinaria*, to enforce the mortgage and vendor's privilege upon property sold by them respectively to the city of Shreveport. The answer denies the power of the city of Shreveport to execute the notes and mortgage; denies that they were ever executed by said city or its authority; denies specially the right of the person or persons professing to sign said instruments, to stipulate on behalf of said city to pay attorney's fees and eight per cent. interest; to waive appraisement; to insert the pact *de non alienando* and to pay costs of copies.

From judgments in favor of the several plaintiffs the defendant appealed.

The Texas and Pacific Railroad Company, as third person, obtained an order of appeal, but has not perfected the appeal, and it is therefore unnecessary to notice the motion to dismiss the same. The record shows that an ordinance was adopted authorizing the purchase of the property in question and the issuance of bonds to provide the means of paying for it, out of the sale of some of which half the price was paid in cash, and for the balance the notes in suit were given, signed by the mayor, who also signed the several acts of sale. The corporation, under its charter, had a right to do this. Having a right to make the purchase it had the right to secure the credit portion of the price by stipulating a mortgage and the vendor's privilege on the property purchased in favor of each vendor, and agreeing not to prejudice the

Edey v. City of Shreveport.

right of mortgage and privilege by any alienation or incumbrance, and to pay the costs or fees incurred by the vendors in enforcing their rights thus preserved. These were all incidents of the contract of sale, the right to insist upon which was included in the right to make the purchases and secure the unpaid portion of the price. The very fact that the city purchased the property for the purpose of donating it to the Texas and Pacific Railroad Company for their depots, made it the more prudent in the vendors to require the pact *de non alienando* rather than a presumption of waiving it.

If there could be any doubt about the authority of the mayor to represent the city in these sales and make the stipulations referred to, his acts were ratified by the acceptance of the transfers and the donation thereof to the railroad, in which the several acts of sale were referred to. The attempted exclusion in this act of donation of any intention to ratify the onerous stipulations under consideration, was without effect against the vendors. The contract of sale as a whole was ratified.

Judgment affirmed.

No. 436.

MRS. MARTHA GRAYSON, Administratrix, and in her own right, v.
JOHN BUIE.

The question in this case is, whether at the expiration of a three years' lease, the defendant delivered a certain plantation with its buildings and appurtenances in a good state of repair, as he had bound himself to do.

Plaintiff having excepted to the introduction of testimony to show that the boards which were retained on one side of the house were as good as new, the judge *a quo* erred in maintaining the exception. The defendant's contract was to cover the house with good boards. Whether the boards were old or new matters not.

The judge *a quo* did not err in refusing the defendant the right to prove in what condition the leased premises were when he took possession of them. Whatever their condition was then, his obligation was to restore them in good repair. Neither did he err when refusing to admit in evidence plaintiff's receipt for rent. She was not suing for rent but for damages. There was error, however, in refusing to prevent the defendant to establish that, when the money for the lease was paid, the plaintiff expressed herself satisfied with the condition of the premises.

The judge *a quo* erred also in not permitting the defendant to prove that the matters involved in this suit had been adjusted before proceedings were taken. His payment of the rent may have been made only upon the stipulation that it was to be regarded as a final settlement between them.

It was proper to reject the testimony offered to prove that the fences of the leased premises were in as good condition as those of the neighbors; that they were sufficient to keep the stock in as well as out; that their state of dilapidation was the result of natural decay, etc. The only question was whether they were in a good condition at the expiration of the lease.

APPEAL from the Twelfth Judicial District Court, parish of Franklin. *Cuny, J.* Jury trial. *Morrison & Farmer*, for plaintiff and appellee. *S. L. Elam*, for defendant and appellant.

MORGAN, J. Plaintiff leased a plantation, situated on the Boeuf river, to the defendant for three years. The terms of the lease were

Mrs. Martha Grayson v. Bule.

two hundred dollars per annum, defendant agreeing to recover the dwelling house with good cypress boards, three feet long, showing one foot to the weather; he was to keep the place in good order, put new posts under the gin sheds; was to have the use of the mill and gin; and at the end of three years deliver the place in good repair. The rent seems to have been paid. The suit is brought to force the defendant to put the place in good repair, in such time as the court may think reasonable, or in default that he be condemned to pay one thousand five hundred dollars additional damages in consequence of plaintiff's not being able to lease the place on account of its bad condition when the defendant left it. There was judgment in favor of the plaintiff for seven hundred and fifty dollars. Defendant appeals. The house was recovered, but the evidence showed that on one side of the roof the old boards were retained. Defendant then attempted to show that the boards complained of were as good as new. To the introduction of this testimony plaintiff excepted and the exception was maintained. The judge erred. The defendant's contract was to cover the house with good boards, whether the boards were old or new mattered not.

The judge did not err in refusing the defendant the right to prove in what condition the leased premises were when he took possession of them. Whatever their condition was then his obligation was to restore them in good repair, and the question was, were they in good repair when they were returned. Neither did he err in refusing to admit in evidence plaintiff's receipt for the rent. She was not suing for rent, but for damages. He did, however, err in refusing to permit the defendant to establish that when the money for the lease was paid, plaintiff expressed herself gratified with the condition of the leased premises. We think he erred also in not allowing the defendant to prove that the matters involved in the suit had been adjusted before proceedings were taken. His payment of the rent may have been made only upon the stipulation that it was to be regarded as a final settlement between them.

Defendant offered to prove by a witness that the fence inclosing the leased premises was, when he returned them, in as good repair as other fences inclosing plantations in the same neighborhood. The judge did not err when he refused to admit this testimony. The contract referred to no fences except those surrounding the property leased by the plaintiff. The condition of the fences of other people, or whether there were any fences on their property or not, was not a matter of any particular concernment to her. Neither did he err in not allowing the defendant to prove that the fence was sufficient to keep out the stock; that no stock broke through the fence; that the dilapidated condition of the fences was the natural result of decay; that the

Mrs. Martha Grayson v. Bule.

ditches had been cleaned out in 1871. The only question being, as we have seen, what was the condition of the place when it was given up, and had the defendant complied with his contract? The errors, however, which we have pointed out, renders it necessary that the case should be remanded.

It is therefore ordered, adjudged and decreed that the verdict of the jury be set aside, and the judgment of the district court rendered thereon be avoided, annulled and reversed, and that the case be remanded to the district court to be proceeded in according to law and according to the views herein expressed, plaintiff to pay costs of appeal.

Rehearing refused.

No. 388.

M. E. DANIEL, Tutor, v. J. A. IVY et als.

The defendants who are sued by certain heirs, as third possessors of an undivided half of the land described in the petition and sold by their father after the death of their mother, excepted to the right of the plaintiffs to recover until a settlement was made of the community that existed between the parents of the plaintiffs, showing a residuary interest in the succession of the deceased spouse. The exception is fatal, and the suit must be dismissed.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd and Brigham*, for plaintiff and appellee. *Newton & Hall, W. T. Hall, D. O. Morgan*, for defendants and appellants.

HOWELL, J. The heirs of M. A. Daniel, deceased wife of W. R. Mayo, sue the defendants as third possessors for an undivided half of the land described in the petition, and sold by their father after the death of their mother.

The defendants excepted to the right of plaintiffs to recover until a settlement was made of the community that existed between the parents of the plaintiffs, showing a residuary interest in the succession of the deceased spouse.

This exception was overruled, an answer was filed, and after having judgment rendered in favor of plaintiffs, defendants appealed.

In the case of *D. Phelan et als. v. Charles Ax*, 25 An., where the same issues were presented, the exception pleaded therein was maintained and the right of action denied. The same ruling has since been made and we consider the question now settled.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants maintaining their exception, and dissolving this suit with costs in both courts.

Mrs. T. J. Mangrum and Husband v. Mrs. C. Norsworthy.

No. 458.

MRS. T. J. MANGRUM AND HUSBAND v. MRS. C. NORSWORTHY, Tutrix.

There is no validity in the defense that, as the plaintiff who sues for the settlement of a commercial partnership, was not separated in property from her husband, the funds which she put in belonged to the community and she has no right of action.

Plaintiff has the right to sue for a settlement, if she was a partner, because this essential right exists in every partnership. Whether the capital which she put in belonged to her or not is a question that does not concern the defendant. Plaintiff's husband, having signed the contract of partnership, authorizing her to make it and having also authorized her to bring this suit, can never demand of the defendant the funds put in by his wife, whether they belonged to the community or not.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiffs and appellants. *Newton & Hall*, for defendant and appellee.

WYLY, J. This is a suit for the settlement of a commercial partnership. The petition alleges in substance: That on the twentieth of January, 1869, Mrs Mangrum, one of the plaintiffs, entered into a contract of partnership with one D. W. Norsworthy, whose succession is represented by the defendant, Mrs. C. Norsworthy, tutrix, for the purpose of carrying on a family grocery in the town of Bastrop; that the business was to be conducted in the name of Norsworthy alone, and each of the partners were to contribute equally in capital, and share equally in the profits of the concern; that plaintiffs had put into the partnership two thousand dollars, and that the profits of the business amounted to at least fifteen hundred dollars; that the partnership lasted one year under the contract, and that Norsworthy died before any settlement of the same. They prayed that a settlement of the partnership be decreed, and for judgment for the two thousand dollars invested by plaintiff, Mrs. Mangrum, in the partnership, and one-half of the profits of the business.

The defendant answered by a general denial.

There was judgment of nonsuit and the plaintiff appeals. The contract of partnership is in the record, and it shows that the plaintiff and D. W. Norsworthy were equal partners, each putting in the business an equal amount of capital.

The assets of the partnership consist of claims against various persons for goods sold on credit, amounting in the aggregate to \$3278 58. There appears to be no debts. The assets should be divided between the partners equally.

The defendant, however, contends that as the plaintiff was not separated in property from her husband, the funds which she put in belonged to the community and the plaintiff has no right to sue.

Plaintiff has the right to sue for a settlement of the partnership if

Mrs. T. J. Mangrum and Husband v. Mrs. C. Norsworthy.

she was a partner, and of this, in view of the evidence, there can be no doubt; because this essential right exists in every partnership.

Whether the capital which she put in belonged to her or not is a question that does not concern the defendant. If she had stolen the money which was invested by the partnership, it would be no reason why there should not be a settlement between the partners. Plaintiff's husband signed the contract of partnership authorizing her to make it. He also authorized her to bring this suit. He can never demand of the defendant the funds put in by his wife, whether they belonged to the community or not.

As the accounts which compose the assets may not all be owing by solvent persons, and as they can not well be divided in kind, we have concluded to order the sale thereof and direct that the proceeds be equally divided between the plaintiff and defendant.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the accounts in the record be sold according to law, and that the sheriff after deducting the expenses of the sale pay over the proceeds, one-half to the plaintiff and the other half to the defendant.

It is further ordered that defendant pay costs of this suit in both courts.

Rehearing refused.

No. 440.

J. W. WILSON, Administrator, v. J. A. CHALARON et al.

The law expressly allowed defendant, J. A. Chalaron, to make a giving in payment to his wife, and it was his duty to cause the registry of her mortgage to be made. This settlement with his wife can be corrected by his creditors, if found to be erroneous and to their prejudice. If the defendant believed the suits in which he confessed judgment were just demands against him, it was not only his privilege, but his duty to admit their correctness or confess judgment. This is no ground for attachment.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. A. B. George and J. D. Watkins*, for plaintiff and appellant. *Egan and Hayes*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment dissolving on motion his attachment sued out against the defendant, Joseph A. Chalaron, on the ground that he was mortgaging and disposing of his property with intent to defraud his creditors.

The proof shows that the defendant confessed judgment in two suits against him, and also made a giving in payment to his wife and caused to be recorded her legal mortgage.

The law expressly allowed him to make a giving in payment to his wife, and it was his duty to cause the registry of her mortgage to be

26	641
46	1344
26	641
48	262
49	1344
26	641
51	1372

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made. The settlement with his wife can be corrected by his creditors if found to be erroneous and to their prejudice. It is no ground for an attachment. It is the duty of suitors to be candid, and if the defendant believed the suits in which he confessed judgment were just demands against him, it was not only his privilege but his duty to admit their correctness or confess judgment. This is no ground for an attachment. Nor was the sale a disposition of his crop. An attachment is a harsh remedy, and those who wish to use it should see that their case come strictly under the provisions of the law.

From the evidence we are satisfied the defendant has not mortgaged or disposed of his property with intent to defraud his creditors. See 22 An. 531.

Judgment affirmed.

No. 468.

STEAMER STELLA BLOCK v. THE PARISH OF RICHLAND et al.

The plaintiff is a peddler or hawker, and was selling his wares in the parish of Richland. Whether he carried them in a pack, in his hand, or on a steamboat, matters nothing. However they were carried, the parish had the authority to demand the payment of a license for the sale thereof, and this without infringing upon the provisions of the constitution of the United States concerning the regulation of commerce.

APPEAL from the Parish Court, parish of Richland. *McIntosh, J. Wade B. Young, M. J. Liddell, P. H. Toler*, for plaintiff and appellant. *W. N. Potts*, District Attorney, *pro tem.* for defendant and appellee.

MORGAN, J. Plaintiff paid, without objection, so far as we can learn, a tax of one hundred dollars.

He seems to be the owner of a steamer named the Stella Block. The tax was levied upon him as a license to trade as a peddler or hawker in the parish of Richland. He says the levy of this tax was an unconstitutional act on the part of the authorities of the parish of Richland and he claims it back.

The plaintiff is a peddler or hawker, and he was selling his wares in the parish of Richland. Whether he carried them in a pack, in his hand or on a steamboat, matters nothing. However they were carried, the parish had the authority to demand the payment of a license for the sale thereof, and this without infringing upon those provisions of the Constitution of the United States by which the regulation of commerce between the States is vested in Congress.

Judgment affirmed.

Rehearing refused.

Hoss v. McWilliams.

No. 504.

JACOB HOSS v. J. G. McWILLIAMS, Executor.

The plaintiff in injunction, Mrs. Murphy, sets up, among other grounds, that she has an interest and ownership in the lots ordered to be seized and sold, superior to the mortgage of Hoss, the plaintiff in execution—which mortgage was granted to Hoss by her husband, now deceased, to guarantee the payment of two promissory notes, and which she alleges to be a fraud upon her rights and void. She further alleges that she has a claim against the succession of her husband for rents and revenues which were under his control and administration, and which were received and converted by him to his own use; that being a party in interest, she was entitled to notice in the executory proceeding, which was not given to her, but only to McWilliams, the executor of her husband. She further avers nullity of the proceeding on the ground of want of jurisdiction in the district court that rendered the order of seizure—the succession being now under administration in the parish court, and was so at the time the order of seizure was granted;

Held—That the grounds urged by the plaintiff in injunction do not authorize the injunction. The district court had jurisdiction to issue the executory process, and the rights asserted by the wife are not such as to justify the injunction of the sale of the husband's property, or property of the community. If she has real rights upon such property, they can be enforced upon the proceeds. If her rights are merely usufructuary, they will not be affected by the sale enjoined, as it is only the naked ownership of the property that is sought to be sold.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Egan & Wise*, for plaintiff and appellant. *Nutt & Leonard*, for J. G. McWilliams, defendant. *A. W. O. Hicks*, for Mrs. Murphy, plaintiff in injunction and appellee.

HOWELL, J. The facts presented in this case seem to be, that the wife of one Hugh Murphy sued her husband in the district court of the parish of Caddo, for separation from bed and board and for paraphernal funds which had gone into his hands. This suit was compromised by the parties in March, 1870, and the husband transferred to the wife during her life time by act in form of a donation, the usufruct, or one-half the rents and revenues of all the property, separate and common, in the parish of Caddo owned by him, and he covenanted by that act not to alienate or encumber the property. The conveyance was duly recorded and the wife dismissed her suit. Subsequently, Murphy gave two notes to Hoss the defendant in injunction, and plaintiff in the executory proceeding, and secured the payment of the notes by a mortgage on two lots in the city of Shreveport, community property between himself and wife. Hoss was proceeding to have the lots sold under his mortgage and Mrs. Murphy enjoined.

The order of seizure and sale was taken out after the death of Murphy without notice to the widow in community, but with notice to McWilliams the executor of Hugh Murphy, deceased.

The plaintiff in injunction sets up among other grounds, that she has an interest and ownership in the lots ordered to be seized and sold superior to the mortgage of Hoss, which she alleges is a fraud upon her rights and null; that she has a claim against the succession of

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her husband for rents and revenues which were under his control and administration and which were received and converted by him to his own use; that being a party in interest, she was entitled to notice in the executory proceeding which was not given. She avers nullity of the proceeding on the ground of want of jurisdiction in the district court that rendered the order of seizure, the succession being now under administration in the parish court and was so at the time the order of seizure was granted. The district judge was of the opinion that he was without jurisdiction on the ground that the case is not of that class in which an executor or an administrator refuses to pay or acknowledge a claim against a succession or resist payment of a debt against an estate, but a case in which the executor joins the creditor in the assertion of a legal, undisputed right. The judge rendered a decree perpetuating the injunction.

We think the judge erred. The grounds urged by the plaintiff in injunction do not authorize the injunction. The district court had jurisdiction to issue the executory process, and the rights asserted by the wife are not such as to enjoin the sale of the husband's property or property of the community. If she has real rights upon such property, they can be enforced upon the proceeds. If her rights are merely usufructuary, they will not be affected by the sale enjoined, as it is only the naked ownership of the property that is sought to be sold.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be dissolved with ten per cent. on the amount enjoined as damages and costs in both courts.

No. 442.

ANDREW J. WILLIAMS v. E. F. WILLIAMS.

Where, in defense to the action, it was alleged by the advocate appointed to represent the debtor who absconded, that the property attached, although in the name of the defendant, was in reality the property of a commercial firm of which defendant was a member, and that partnership property could not be attached;

Held—That it would be time enough to pass upon this defense, when made by some one having an interest to make it, to wit: one of the partners, or a creditor of the firm, if there be a partnership.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. Ellis & Roberts*, for plaintiff and appellant. *J. N. Nelson*, for defendant and appellee.

LUDELING, C. J. This is an attachment suit on notes executed by the defendant.

The advocate appointed to represent the debtor, who had absconded, for defense to the action alleged that the property attached, although in the name of the defendant, was, in reality, the property of a com-

Williams v. Williams.

mercial firm, of which defendant was a member, and that partnership property could not be attached.

It will be time enough to pass upon this defense when it is made by some one having an interest to make it, to wit: by one of the partners or by a creditor of the firm, if there be a partnership.

The evidence establishes the debt sued upon, and that the debtor had absconded.

It is therefore ordered and adjudged that the judgment of the lower court be avoided, and there be judgment in favor of the plaintiff against the defendant for seven thousand and thirty-four dollars and seventy-four cents, with eight per cent. per annum interest from the seventeenth day of March, 1874, on six thousand dollars, and five per cent. per annum interest on the sum of one thousand and thirty-five dollars from judicial demand, and costs in both courts, and that the property attached be sold to satisfy the same, according to law.

No. 506.

JOHN L. HARGROVE v. A. FLOURNOY, Sheriff, et al.

The exemption of one hundred and sixty acres of land with the improvements, together with the work stock, supplies, etc., mentioned in the homestead act of 1852, shows that the intention of the law was to preserve a homestead for a farmer, in order that his family might be supported and his occupation might not be broken up. It has no application to a case like this, where there is merely a house and lot occupied as a residence by an attorney at law.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. H. H. Hargrove*, for plaintiff and appellant. *A. W. O. Hicks*, for defendant and appellee.

WYLY, J. The plaintiff borrowed from the defendant, Mrs. R. B. Ragland, \$4083 20 in gold, with which to make the cash payment on the purchase of a dwelling house and lot of ground about three-quarters of a mile beyond the corporate limits of the city of Shreveport, and executed a special mortgage to secure the same. This lot of ground and house was used by the plaintiff as a place of residence, he being occupied in the practice of law at Shreveport.

The defendant, Mrs. Ragland, sued out an order of seizure and sale to collect the money thus loaned, and the plaintiff enjoined the execution thereof, claiming the benefit of the homestead act of 1852.

The question is, is the property thus used and occupied exempted from seizure by said act? We think not. The exemption of one hundred and sixty acres of land with the improvements, together with the work stock, supplies, etc., mentioned in the act, show that the intention of the law was to preserve a homestead for a farmer, in order that

Hargrove v. Flournoy, Sheriff, et al.

his family might be supported and his occupation might not be broken up. It has no application to a case like this, where there is merely a house and lot occupied as a residence by an attorney at law. This point was in principle settled in the case of *Crilly v. Sheriff et al.*, 25 An. 219.

It is therefore ordered that the judgment herein in favor of the defendants be amended so as to allow ten per cent. general damages for suing out the injunction, and as thus amended let it be affirmed, appellant paying costs of appeal.

Rehearing refused.

No. 463.

MOLLIE E. LIVINGSTON v. D. C. MORGAN.

The evidence in this case shows that the plantation which is the object of this suit was purchased in his name, for the benefit of plaintiff, by defendant, who was the agent and attorney at law of plaintiff's mother and tutrix, then absent from the State, and that he expected the plaintiff to have sufficient funds out of the succession of her grandfather to pay the note given by him for the price at the maturity thereof.

The question is: Having failed to collect for the minor funds sufficient to pay said note at maturity, was defendant justified in refusing to transfer the title to plaintiff, when she returned to the State, was emancipated by the court, and tendered to him the note which he had executed for the land, and \$500, the cash he had paid on that note, with interest on said payment?

Held—That, under such circumstances, he was not justified in refusing to transfer the title to the plaintiff.

Whether the defendant had, or had not, special authority from the court to buy the land for the minor is immaterial. He did buy for her, he agreed to convey it to her when necessary, and this proposition had not been withdrawn when she accepted it and made the tender.

As the defendant has enjoyed the use of this land for a long time, he is not entitled to interest on the amount of the price paid by him, nor is plaintiff bound to refund the amount of the taxes paid by defendant.

The court *a qua* erred in not allowing the reconventional demand of the defendant for professional services and for money advanced to the natural tutrix of plaintiff for her benefit.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiff and appellant. *D. C. Morgan*, in *propria persona*, appellee.

WYLY, J. The plaintiff, an emancipated minor and sole heir of R. D. Livingston, sues the defendant to compel him to transfer to her a certain plantation which he bought at the succession sale of her father on the second December, 1867, on twelve months' credit for \$1551, on the ground that said Morgan was the general agent and attorney at law of her mother, her natural tutrix, then absent from the State, and that he bought said land for the benefit of plaintiff, taking the title in his own name with the understanding that he would transfer it to plaintiff when necessary, she making good to him the price given for the land.

Mollie E. Livingston v. Morgan.

The court gave judgment rejecting plaintiff's demand and she has appealed. It will be necessary to examine the evidence.

G. M. Croxtan testifies: "I am administrator of the estate of R. D. Livingston, deceased, and Mrs. S. C. Livingston is coadministrator. I applied for and obtained an order for the sale of the land belonging to the estate of R. D. Livingston, deceased. D. C. Morgan became the purchaser of the land at the sale, and it was my understanding that it was for the benefit of Mollie E. Livingston. I understood so from Captain Morgan. I told parties that it was to be bought for Mollie E. Livingston. That was the understanding between me and Captain Morgan. That is, if the land did not sell for enough to pay the debts; if it did, he was to let it go. The debts were between \$2500 and \$3000. I have been on the place frequently; \$500 would be fair average rent for the place; it is good gum land, and a fair average yield is about a bale of cotton and twenty-five or thirty bushels of corn per acre."

D. C. Morgau, the defendant, testifies: "That in the month of March, 1866, I agreed to act as agent for S. C. Livingston, tutrix for the minor child Mollie E. Livingston, during their absence to the State of Alabama. I went with them to the city of New Orleans, and my last instructions from her was to avoid the sale of the land belonging to the succession of her husband, R. D. Livingston, the land here in controversy. In 1867 the creditors of the succession of R. D. Livingston became clamorous for their money, and the land being the only property belonging to the succession the administrator was forced to get an order for its sale, and the property was advertised for sale. These facts were communicated by me to the tutrix by letter. I addressed, two or three times, letters containing the facts to her in Alabama. I stated I would buy the land if it did not sell for cash and if sold on a credit; and if her ward, Mollie E. Livingston, had funds to pay for the same at the time of the maturity of the obligation, and if she would take the necessary steps to take the title, that I would make a transfer of the title to her. This proposition I made once or twice before the sale and on two or three occasions subsequent, and once a short time previous to the maturity of the obligation for the purchase price. I informed the tutrix that the note would soon mature and if she wanted to avail herself of my proposition she must be ready to meet it; that if I had the debt to pay I would certainly want to retain the title to the land. These propositions were all made through the mail as above stated. I think I received a reply to some of those letters. I received no instructions to pay the note, for the very reason there were no funds available for the same that I knew of. I received no instructions to take any legal steps to transfer said title, by advice of a family meeting or otherwise. The purchase, on my part, of the

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land in controversy and the proposition to transfer it to the minor, was not as agent of the minor, but as a friend of the minor. I had no authority to act as agent to make said purchase. That at the time of said purchase, nor at the time of the maturity of the obligation of the purchase price, nor before nor since, has the plaintiff ever had in my hands one dollar belonging to her or the tutorship. At the close of the year 1869, or the first of 1870, I was indebted for the rent of land to the succession of Aaron Livingston something over three hundred dollars, which, by an agreement of the administrator of the estate, I held and retained in my hands, for the benefit of the tutorship; but as the tutorship owed me then a large amount of money in excess of these rents I considered this amount compensated," etc.

On cross-examination this witness states: "I expected to have funds in my hands from her grandfather's succession, sufficient to pay the note given for the place in controversy. I have never paid all the note given for the land; only paid in cash the amount indorsed on the back of it (\$500)."

From the foregoing it appears that the defendant bought the land for the benefit of the plaintiff, expecting to collect funds as the attorney of plaintiff's tutrix from the succession of her grandfather, "sufficient to pay the note given for the place in controversy," he having all the business of the tutorship in his hands. And this conclusion is confirmed by the following written admissions of the defendant, which are in the record:

"Defendant admits that on or about the second day of December, A. D. 1867, he wrote a letter to the plaintiff, she being at the time in the State of Alabama, in which he informed her that the land in controversy in this suit, and which then belonged to the estate of her father, R. D. Livingston, deceased, had been sold on that day (second December, 1867), on a credit of twelve months for fifteen hundred and fifty-one dollars, and that he would take the title in his own name and can transfer the same to her (plaintiff) when necessary.

" D. C. MORGAN."

The letter, of which the above admissions contain the substance, written on the day of the sale, addressed to the plaintiff, then a minor child at school in the State of Alabama, taken in connection with the testimony of Croxton, the administrator who procured the order of sale, and also the statement of Morgan, the defendant, on cross-examination, show beyond doubt that the land was purchased by Morgan for the benefit of plaintiff. He expected the plaintiff to have sufficient funds out of the succession of her grandfather to pay the note given by him for the price at the maturity thereof.

Now the question is, having failed to collect for the minor funds suf-

Mollie E. Livingston v. Morgan.

ficient to pay the note at maturity, was Morgan justified in refusing to transfer the title to the plaintiff in September, 1870, when she returned from Alabama, was emancipated by the court, and tendered to him the note which he had executed for the land and \$500, the cash he had paid on that note, with \$60, the interest on said payment? We are of the opinion that he was not justified under the circumstances in refusing to transfer the title to the plaintiff. In the position which the defendant occupied towards the plaintiff and her mother, the law exacted from him the utmost good faith. He had been put in charge of all their business, and they were absent from the State. In his letter to the minor on the day of the sale, according to his written admissions in the record, he informed her that her father's place had that day been sold on a credit of twelve months for \$1551; "that he had taken the title in his own name and could transfer the same to her when necessary." In this letter there was no condition stipulated upon the happening of which he designed keeping the land. He acknowledged that the purchase was for the plaintiff, and virtually promised to convey it to her when necessary, that is when required.

Whether he had special authority from the court to buy the land for the minor or not is immaterial. He did buy for her and agreed to convey it to her when necessary. Until the minor was emancipated in 1870, she could not, independently of her mother, have availed herself of the proposition made by the defendant. It had not been withdrawn when she accepted it and made the tender. Up to that time defendant seems to have had charge of all her business. He has only paid five hundred dollars on the price. If the creditors were clamorous for their money, as he says, and therefore forced the sale of the land upon him, the attorney of the plaintiff and her mother, they certainly have not displayed much zeal in collecting from him the price; for he still holds two-thirds of the price, and has enjoyed the use of the plantation since December, 1867, and the value of the rent is proved to be \$500 per annum. If the defendant acted as a friend, as he says, in buying in the property for the plaintiff, like a friend and faithful attorney he should have cheerfully transferred it to her when tendered the price, because he had then enjoyed the use of the property for several years, the rent of which up to that time was doubtless worth as much as the price at which the property had been adjudicated to him. The fact that the defendant was able to buy in that valuable plantation at the paltry sum of \$1551, and that he has been permitted for so many years to retain in his hands the greater part of the price, in the midst of clamorous creditors, makes it highly probable that the defendant gained this great bargain and this long indulgence in paying the price, by reason of the understanding at the sale and with the administrator that the purchase

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was for Mollie E. Livingston, the minor daughter of the deceased. Competition would hardly be so great at a probate sale, where it was reported that a minor child, through a friend, was bidding and was seeking to buy in the home of her father.

The defendant, the attorney of the plaintiff, had no right to use the position he occupied by reason of his employment for his own advantage and to the prejudice of his client, for whom he bought the land, taking the title in his own name and agreeing to transfer it to her "when necessary," that is when required. In law and in equity the defendant is bound to transfer the title to the plaintiff. 4 M. 409 ; 14 An. 632.

As the defendant has enjoyed the use of the land he is not entitled to interest on the amount of the price paid by him, nor is plaintiff bound to refund the amount of the taxes paid by the defendant. The court erred in not allowing the reconventional demand of the defendant and settling at once the controversy between the parties. The demand is for professional services and for money advanced to the natural tutrix of plaintiff for her benefit, amounting in the aggregate to \$2485 75, and it is established by the evidence in the record. Included in this is a note for one hundred dollars in gold, given by plaintiff's tutrix on the eighth March, 1866. From this reconventional demand must be deducted \$450, the amount collected for rent of the Aaron Livingston place, and from Wright, by the defendant for plaintiff.

It is therefore ordered that there be judgment in favor of plaintiff requiring the defendant to transfer the title of the land in controversy in this case to her on tendering to him the note executed for the price, together with the sum paid by him on said note, or on tendering the whole price, if the defendant has paid it. It is further ordered that there be judgment in favor of the defendant against the plaintiff for one hundred dollars in gold, with eight per cent. interest from March 8, 1866; also for the further sum of nineteen hundred and thirty-five dollars and seventy-five cents, with five per cent. interest on twelve hundred and thirty-five dollars and seventy-five cents thereof from eighteenth October, 1870; and with eight per cent. interest on seven hundred dollars thereof from the eighth day of March, 1866. It is further ordered that the appellee pay costs of appeal; that defendant pay costs of the principal demand in the lower court, and plaintiff pay costs of the reconventional demand.

Mrs. Sarah Richardson v. Dinkgrave, Sheriff, et al.

No. 433.

MRS. SARAH RICHARDSON v. B. H. DINKGRAVE, Sheriff et al.

The judge *a quo* did not err in refusing to allow the plaintiff to take a judgment by default on the supplemental petition which had been filed by her, in which she set forth additional reasons why an injunction should issue. The allegations were not sworn to. Admitting that a supplemental petition to an application for an injunction is permissible, which it is not necessary to determine in this instance, still the truth of the allegations in the supplemental petition should be sworn to.

Before proceeding to trial, plaintiff moved that the rule taken upon her by Pargoud, to prove the truth of her allegations in a summary manner, should be considered as an answer. The judge did not err in refusing the motion. Defendant had the right to call upon the plaintiff to verify the truth of her allegations without an answer.

Defendant having testified that he had received account sales for all the cotton which had been sent to him by plaintiff, and that he had delivered the same to his attorneys who were then in court, was asked to produce them. This was objected to by defendant. The objection was correctly sustained under article 140 of the Code of Practice. Besides, there are account sales in the record regarding five hundred and twenty-nine bales of cotton, which is all the cotton received by the defendant from the plaintiff.

The plaintiff's allegations charge the defendant with bad faith and fraud. Under the pleadings these were allegations which it devolved upon her to establish, and if she had not done so, perhaps the defendant might have contented himself with leaving the case where she did, but there is no reason why, if he chose, he should not be allowed to show by positive testimony that such grave charges against his honesty and honor were without foundation. The judge *a quo* did not err in permitting him to do so, and overruling plaintiff's objection to the introduction of such testimony.

On the trial, plaintiff's counsel moved the court to continue the case to enable her to procure her testimony, or that they might be permitted to send for her, she being only a short distance from the courthouse. The judge properly refused and ordered them to proceed. Plaintiff had not been subpoenaed as a witness, and there was no process by which her attendance could have been compelled. If she had intended to be heard in her own behalf, she should have been present to testify when the time came.

The testimony offered by plaintiff to show that other persons than Pargoud had furnished her with supplies and made improvements on her plantation, was properly rejected as irrelevant. It did not follow that the defendant had not done the same for her.

The judge *a quo* did not err in not allowing the defendant to open and close the argument. This right belongs to the plaintiff in injunction. Neither did he err in permitting the plaintiff to call for papers necessary to make out her case, after the entry had been made on the minutes that the testimony was closed. This was a matter entirely within his discretion.

It is false doctrine to say that, where a factor who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege rests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer, D. N. Barrow*, for plaintiff and appellant. *S. P. M. McEnery, K. G. Cobb*, for defendant and appellee.

MORGAN, J. Buckner, tutor, was a mortgage creditor of the late J. T. Richardson. So was J. Frank Pargoud. Buckner foreclosed his mortgage. Pargoud bought the property—the Ingleside plantation. This on the fifth September, 1868. On the twelfth November, 1868, Pargoud addressed to the plaintiff the following note:

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“ Lower Plantation, November 12, 1868.

“ Dear Madam—When I purchased the property known as Ingleside Plantation, and belonging to the late J. N. T. Richardson, your husband, I had no other intention but to secure what he owed me. Therefore I take pleasure in informing you that if at once the amount due me, with eight per cent. interest, will be paid by yourself or by any one in your name, the property will be yours again. Hoping this will meet with your approval.

“ I am, madam, respectfully and truly yours,

J. FRANK PARGOUD,

Mrs. Sarah Richardson, her plantation.”

Mrs. Richardson remained on the plantation, working the same. Pargoud furnishing her the money and supplies necessary thereto.

On the thirtieth October, 1871, Pargoud wrote to Mrs. Richardson, telling her that, in the interest to them, and still more to her daughter, it was time for him to sell to her the Ingleside plantation. His proposition was to sell it for one-half of the debt which it owed him cash, and the balance at twelve months. The debt he states to be between \$34,000 and \$35,000.

On the ninth November, 1871, he wrote to her again upon the same subject. In this letter he states the indebtedness of the plantation to be \$28,406 54, and he proposed to sell it to her for that amount—\$10,000 cash and the balance in four notes, payable in one, two, three and four years. In case the cash payment of \$10,000 is made, he proposes to deduct the year's interest on \$28,606 54, which, he states, will amount to near \$2,000.

On the twenty-seventh December, 1871, Pargoud sold to Mrs. Richardson the Ingleside plantation for \$28,400. The terms were, one note for \$10,400, payable on the first January, 1873, and the balance in four equal annual installments of \$4500 each, with interest at eight per cent. per annum from date until paid. To secure the payment of these notes, a mortgage on the property sold was reserved. The first note was not paid at maturity. Pargoud obtained an order of seizure and sale. Mrs. Richardson enjoined.

The allegations upon which the injunction issued are, that when Pargoud purchased the Ingleside plantation the debt due to him was \$28,000; that before the purchase it was understood and agreed that he should become the purchaser in order to secure to him the payment of his debt; that in accordance with this agreement Pargoud furnished his counter letter, in which the foregoing agreement was acknowledged; that she has paid the debt for which she has been sued; that during the years 1869, 1870 and 1871 she held possession of the property; that she made large crops of cotton and other produce thereon, all of which

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was delivered to Pargoud to be applied to the liquidation and payment of the indebtedness, and which, if they had been justly and legally applied, would have canceled and annulled the whole of this indebtedness; that in the years above set forth she delivered to Pargoud about five hundred and seventy bales of cotton, which sold for more than \$50,000, all of which was received by him, and which, if legally applied, would have extinguished the mortgages and claims then existing on the property; that Pargoud never furnished her with any detailed account of the manner in which he disposed of her cotton; that on the ninth November, 1871, Pargoud fraudulently and erroneously represented that the indebtedness amounted to \$28,406 54, and then proposed to transfer to her the plantation for that amount, which she finally agreed to. She avers that but for fraudulent concealment by Pargoud of the true statement of her accounts, and but for his false representations that the original mortgage claims still subsisted, when in truth they had been extinguished by legal imputation of the funds received by him during the years 1868, 1869, 1870 and 1871, she would not have executed the mortgage, but would have required him to comply with the conditions of his counter letter and to make her a title to the property, and left him to pursue his legal rights for any other indebtedness, or the settlement of any other accounts that might have existed between them; that on these false and fraudulent representations, believing she could not enforce her counter letter on account of the original indebtedness not being paid, she was imposed upon, and consented to secure the said debt of \$28,406 54. She avers that a true, just and legal statement of the accounts between Pargoud and herself will show that the amount due by her did not amount to \$28,406 54, by fully the amount now sought to be recovered from her, and therefore that her property can not be sold to pay the same.

Pargoud, representing that the injunction was obtained without bond, and that the allegations in the petition therefor were false, took a rule upon the plaintiff to show cause why she should not, within ten days after notice, prove the truth of the allegations contained in her petition in a summary manner. Citation issued as prayed for, returnable on the second day of the following term, general or special, of the court, and after hearing the injunction was dissolved. Plaintiff appeals.

The litigation seems to have been violently contested, and the record comes to us crowded with bills of exceptions, which we proceed to consider.

The judge did not err in refusing to allow the plaintiff to take a judgment by default on the supplemental petition which had been filed by her on the sixteenth August, 1873, in which she set forth addi-

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tional reasons why an injunction should issue. The allegations were not sworn to. Admitting that a supplemental petition to an application for an injunction is permissible, which it is not necessary for us now to determine, still the truth of the allegations in the supplemental petition should be sworn to.

Before proceeding to trial, plaintiff moved that the rule taken by Pargoud should be considered as an answer. The judge did not err in refusing the motion. Defendant had the right to call upon the plaintiff to verify the truth of her allegations without an answer.

Defendant having testified that he had received account sales for all the cotton he had received from plaintiff, and that he had delivered the same to his attorneys, who were then in court, was asked to produce them. This was objected to by the defendants. The objection was correctly sustained under article 140 of the Code of Practice. Besides, there are account sales in the record regarding five hundred and twenty-nine bales of cotton, which is all the cotton received by the defendant from the plaintiff.

Defendant was asked: "Did you ever furnish to Mrs. Richardson a detailed account showing how her account stood with you from time to time on your books, and showing the dates, names and items, and amounts, credits and debts, interest and commissions?" To which he answered: "I gave Mrs. Richardson at several times details of what I had purchased for her, according to her orders, and price of the articles. Accounts of merchants in Monroe she had directly from them, I paying the accounts after her order. This is all my answer." He was also asked: "Were these statements of items furnished by you contained in an account showing a succession of charges, debts and credits, or were they in separate statements?" To which he answered: "Whenever any of the goods Mrs. Richardson ordered came, they were delivered to her and at the price sent to her, in order that she might know what they cost; and when they were on separate bills from mine the bills were sent to her, as the goods were landed at some place designated by her in Monroe. As far as I can remember the goods were landed once or twice at Chamberlain's warehouse." Upon each of the foregoing answers being made, counsel for plaintiff moved that the witness be required to answer the questions over, as his answers were not responsive. The judge refused, and we think correctly, as it appears to us that the questions were substantially answered. If plaintiff had wished more categorical answers, the questions should have been more categorical. If she wished to know whether the defendant had furnished her with detailed accounts showing the number of bales of cotton he had received for her account; the price they sold for; what had been done with the proceeds; what commissions had been charged,

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etc., it would have been easy to have asked the question, so that the answer would necessarily have informed the court of the fact she desired to elicit.

Defendant was allowed to introduce evidence to prove that he had furnished plaintiff with supplies, paid her personal expenses, taxes, repairs, and improvements on the Ingleside plantation, to the amount of all the cotton he had ever received of the plaintiff. To the introduction of this testimony the plaintiff objected on the ground that he had not alleged the same, and that to allow him to make the proof was taking her by surprise, and deprived her of an opportunity of being prepared with evidence to rebut whatever proof he might adduce, and that this evidence was not offered in rebuttal of anything offered by her.

The plaintiff's allegations are distinct that defendant received cotton belonging to her, and that if the proceeds thereof had been properly applied his debt would have been paid, and he is, in terms, charged with bad faith and fraud. Under the pleadings there were allegations which it devolved upon her to establish, and if she had not done so, perhaps the defendant might have been justified in contenting himself with leaving the case where she did. But we see no reason why he, if he chose, should not be allowed to show by positive testimony that such grave charges against his honesty and honor were without foundation, and we do not think that the judge erred in permitting him to do so.

On the trial plaintiff's counsel moved the court to continue the case until Monday in order to enable them to procure her testimony, or that they might be permitted time to send for her, she being only a short distance from the courthouse. The judge refused and ordered them to proceed. A messenger was dispatched after the plaintiff, but before she reached the courtroom the evidence was closed. To this action of the judge plaintiff reserved a bill. The judge did not err. Plaintiff had not been subpoenaed as a witness, and there was no process by which her attendance could have been compelled. If she had intended to be heard in her own behalf she should have been present to testify when the time came—her proximity to the courthouse is no reason why she should have been sent for. The same principle would apply if she had been at the other end of the parish. The question is whether she had the right to have the case postponed in order to give her an opportunity of being heard. She unquestionably had not the right, and the judge did not therefore err in refusing to continue or postpone the case on account of her absence.

Plaintiff offered two witnesses to prove that they had worked on the Ingleside plantation, furnishing materials to the defendant, and to

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prove by them what buildings had been put up by them and what repairs they had made, for the purpose of rebutting the testimony of Pargoud and others with regard to the improvements made upon the place, for which he had paid large sums of money. The judge correctly rejected the testimony. It was irrelevant. They might have done a great deal of work on the plantation, but whatever work they did did not establish the fact that Pargoud had not paid for the improvements which he swears to.

The judge erred in refusing to allow the witness, Scarborough, to testify as to what Pargoud stated to Goodrich with reference to the correctness of the accounts between himself and Mrs. Richardson. But his evidence, if admitted, would not have controlled the case or affected the result, and we will not therefore remand it on that point. Neither did he err in refusing to permit Hilliard and others to prove that they were laborers, working on shares on the Ingleside plantation during the years 1869, 1870, 1871, and that Pargoud furnished them with no supplies. Their testimony, if received, would not have rebutted the testimony of Pargoud that he had furnished the supplies he charged for. The testimony is, that the Ingleside plantation was worked, in part, on shares; part of the land was rented, and part was cultivated with hired labor. Nor do we find any error in the judge's refusal to admit the account of S. Meyer in evidence. It would have had no effect if it had been received. Because the plaintiff procured supplies from Meyers it does not follow that she did not procure them from the defendant also.

Pargoud was asked by plaintiff whether he had not supplied and furnished money, plantation supplies, mules and other things necessary for carrying on a plantation, to Mrs. Wilson, Mrs. Mason, J. D. McEnery, J. G. Wilderson, Holmes, Umberly, R. Wilderson and P. Ranson, on the same terms on which he had furnished the Ingleside plantation. The judge did not err in refusing to permit this question to be answered. If answered we do not see that it would have proved anything beyond the fact that the defendant was willing to assist his neighbors. It would not have rebutted the testimony of the defendant that he furnished supplies to the plaintiff. On the contrary, the statement in this regard in the bill seems to be an admission that he did furnish her with supplies, and thus does away with the idea conveyed by her other bills that the defendant did not furnish them.

The judge did not err in not allowing the defendant to open and close the argument. This right belongs to the plaintiff in injunction. Neither did he err in permitting the plaintiff to call for papers necessary to make out her case, after the entry had been made on the minutes that the testimony was closed. This was a matter entirely within his discretion.

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Serialim, we have taken up the bills of exception. Having disposed of them, we now turn to the case on its merits.

Pargoud's letter of the twelfth of November, 1868, to Mrs. Richardson, was a proposition to convey to her the Ingleside plantation upon certain conditions. It is evident that Mrs. Richardson accepted the proposition, as she remained in possession of the property. The conditions were that the transfer should be made whenever the debt due thereon to him should have been paid. Matters remained in this state until the thirtieth of October, 1871, when Pargoud wrote to her, telling her that it was best he should sell her the plantation. In this letter he proposed certain terms of sale. On the ninth of November, of the same year, he again wrote to her. In this letter he states the indebtedness of the place to be \$28,406 54, and he proposed to sell it to her for that sum, \$10,000 to be paid in cash, and the balance in four equal annual installments.

On the twenty-seventh December, 1871 he sold the plantation to her for \$28,000, \$10,000 payable on the first of January, 1873, and the balance in four equal annual installments. The first note was not paid. Executory process issued upon it. Then came this injunction. Error on the part of the plaintiff, fraud on the part of the defendant, and improper application of her funds, are the alleged grounds upon which the injunction rests.

When Pargoud purchased the Ingleside plantation, the debt due to him, added to the one he controlled, amounted to \$27,366. When Mrs. Richardson retained the property under his letter of the twelfth of November, 1868, she appears to have been unable to make the necessary arrangements for getting plantation supplies. Pargoud then came to her assistance and furnished them. This he continued to do for several years. She sent him her cotton, which he sold. The amount received by him exceeded the amount of his debt, and the main theory upon which the plaintiff relies in support of her claim is that the money received by him should have been imputed to the payment of the original debt. In other words, and indeed in almost the terms of her petition, that the mortgage should have been paid out of the proceeds of her crops, leaving whatever sum might be due for the advances which enabled her to make the crops a matter to be settled afterwards. But the parties occupied two positions towards each other. One was that of debtor and creditor, the other principal and factor. The creditor was secured by mortgage; the factor was secured by privilege upon such produce as had been made with the moneys and supplies furnished by him. One debt was secured by a convention; the other was secured by the law, and both were independent one of the other. It is therefore false doctrine to say that, where a factor who has made

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advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege rests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation.

The error complained of is that she was misinformed as to the state of her accounts with the defendant when she agreed to give the price she contracted to give for the plantation. The evidence does not establish this fact. It is in evidence that she had access to the defendant's books, in which her accounts were kept; that she frequently examined them; that such errors as were pointed out by her were corrected. It does not seem to us that after the letter of the ninth November, in which the indebtedness is stated, was received by her, and after she made the purchase for the amount therein stated, with the exception of a few hundred dollars, she can not now say that there was error in the price or her indebtedness.

Neither do we see any evidence upon which to support the allegations of fraud which are contained in the petition. The affirmative of this grave accusation was on the plaintiff, and neither she nor any of her witnesses have established any fact upon which such an allegation could properly rest. The record satisfies us that instead of attempting to despoil the plaintiff, he has been endeavoring to befriend her; offering to convey to her property which he was not bound to convey; furnishing her with money and supplies as she called for them after she had failed to get them elsewhere; selling her the property entirely on credit, and receiving her thanks—as we find them expressed in her letters—until he exacted a performance of her contract. Under these circumstances the district judge did not err when he dissolved the injunction which kept him out of his rights.

Judgment affirmed.

Rehearing refused.

No. 488.

S. Q. C. STAFFORD, Tutor, v. WM. L. PEARSON and R. F. WILLIAMS.

Tobacco, pipes, whisky, cards, perfumery, etc., etc., are in no sense supplies necessary to make a crop. For such supplies the law allows no privilege.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Todd & Potts*, for plaintiff and appellee. *F. P. Stubbs*, for defendants and appellants.

WYLY, J. The defendants appeal from the judgment against them

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for \$2085 45, with recognition of furnisher of supplies privilege on their crops.

They assign as error of law that of the account sued on, items amounting in the aggregate, to \$378 98, were not necessary supplies; and therefore, the privilege to that extent should be reduced. The items objected to, consisting mainly of tobacco, pipes, whisky, cards, perfumery, etc., etc., are in no sense supplies necessary to make a crop. 23 Au. 469. For such supplies the law allows no privilege.

It is therefore ordered that the judgment be amended by reducing the amount of the privilege three hundred and seventy eight dollars and ninety-eight cents, and as thus amended let it be affirmed, appellee paying costs of appeal.

No. 509—No. 8383, 8454, 8606—consolidated.

Hoss & Elder, Administrator v. George J. Jones.

As the administrator of an estate can not bind the estate he represents *ex contractu*, without the authority of the judge, the estate can not be bound by a breach thereof.

The plea of payment and that of novation are inconsistent. A debt paid can not be novated. There is nothing to novate.

An administrator has no power to novate a debt due to the succession under his charge, without at least having been authorized to do so.

Under no circumstances can the administrator of an estate take in payment of the rent of property a draft payable at the end of the lease, and thus give up the privilege which the estate he represents has on the growing crop.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. Egan & Wise, Land & Taylor, for plaintiffs and appellees. Nutt & Leonard, for defendant and appellant.

MORGAN, J. A plantation, belonging to the succession of which plaintiffs were administrators, was rented annually, under order of court, by public auction. At each offering the defendant became the lessee.

For the year 1870, he agreed to pay a rent of \$2600, giving his endorsed note for that amount, payable on the first January, 1871.

For the year 1871, he agreed to pay a rent of \$2600, giving his draft for that amount on Payne, Dameron & Co., of New Orleans.

For the year 1872, he agreed to pay a rent of \$1200, giving his endorsed note therefor.

The first year's rent was not paid. Suit was brought therefor, and a writ of provisional seizure issued. So with regard to the second year's rent. And so with regard to the third.

To the first demand he pleads specially payment and novation. Re-convening, he claims damages to a large amount for the failure of the administrators to replace a gin house and mill on the plantation which

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had burned down before he took possession, and which prevented him from grinding corn and delayed him in the gathering of his crop; which caused some of his cotton and cotton seed to rot, etc.

To the second suit he answers that he gave his draft on Payne, Dameron & Co. in payment of the rent; that this draft is still held by them, and that his liability therein has been extinguished in consequence of the failure of the administrators to present said draft for payment, and because the draft was not legally protested for non-payment. He also alleges that the succession is indebted to him in sums as set forth in his answer to the first suit, which he makes part of his second answer, and that it is indebted to him in the further sum of \$100 for building a house on the plantation under contract with the administrators, and in the further sum of \$320, rent of dwelling house occupied by Cornelia Hart, and in the further sum of \$1789 87 for lumber, etc., purchased by the administrators from defendant for use of the plantation.

To the third suit he alleges that the succession of Hart is largely indebted to him, as set forth in his answers to the two preceding suits.

If his pretensions are well founded, the result will be that instead of receiving the rent which he agreed to pay for the property, which he occupied for three years, and upon which he made crops, the succession of Hart will have to pay him some \$16,000.

The cases were consolidated, and from a judgment against him he has appealed.

A motion to dismiss the appeal is made on the ground of acquiescence. We do not find that acquiescence which gives to the judgment the authority of the thing adjudged. The motion to dismiss is therefore refused.

The defendant in the court below moved for a new trial, on the ground that the judgment had been rendered and signed in chambers. But we think that as he agreed that this should be done, the agreement being on the minutes of the court, the judge did not err in refusing it. A motion was made by the plaintiff to strike out the defendant's reconventional demand. The conclusion to which we have arrived on the merits make it unnecessary that we should pass upon this motion. With regard to the reconventional demand contained in his answer to the first suit, it is sufficient to say that, as an administrator of an estate can not bind the estate he represents *ex contractu*, without the authority of the judge, the estate can not be bound by a breach thereof. As regards the novation which he pleads, his position is inconsistent. He pleads payment and novation. A debt paid can not be novated; there is nothing to novate. Besides, admitting the novation, which we are far from doing—on the contrary, we think there was none—we think

an administrator has no power to novate a debt due to the succession under his charge, without at least having been authorized to make it. The alleged novation consisted in this: When the note became due in July, 1871, it was not paid. The defendant then gave a draft on Payne, Dameron & Co. for the amount thereof, payable on the first April following, and his note was given up to him. He then notified Payne, Dameron & Co. not to accept or pay the draft, and it was not accepted. Whether this was a novation or not, the administrator had no right to make it. See *Landry v. Percy*, 25 An. 183.

In that case it was said: "An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the term of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents, which do not come within the purview of their power, and which are, therefore, not regarded as binding on their principals.

"If an administrator could, by his private contracts, bind an estate, or make it liable for his fault, negligence or non-performance in the matter of his contracts, the interests of heirs and creditors would be in constant jeopardy. As said by Judge Martin in the case of *Flower v. Swift*, 8 N. S. 452, in regard to the indorsement of a note by an executor: 'Such a contract is not in the scope of an executor's authority, i. e., he can not thereby bind the estate to pay damages or even to refund the amount of the note; for if he could, he could ruin the estate by making it liable to pay the amount of notes of its insolvent debtors. As the executor can not bind the estate by indorsement, it follows that the liability resulting from those he makes is personal.'"

His defense to the second suit that the rent was paid by draft, given in anticipation, on Payne, Dameron & Co. is not good. The draft was not paid, and if it be true that it was neither presented or paid, as is alleged, defendant should at least have shown that he had funds with the drawees to meet the draft at maturity. This he has not done. Under no circumstances can the administrator of an estate take in payment of the rent of property a draft payable at the end of the lease, and thus give up the privilege which the estate he represents has on the growing crop.

His reconventional demand is governed by what we have already said with regard to similar claims in the first suit.

The defense to the third suit rests on the grounds alleged in the two preceding ones, and is disposed of in the same way.

The judgment of the district court reserves to him his rights against the administrators personally for any damages which their conduct may have caused him. This is all that can be accorded to him.

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Plaintiffs have prayed that the judgments be amended by recognizing a privilege on the property provisionally seized and attached in these suits. We think they are entitled to this.

It is therefore ordered, adjudged and decreed that the judgments of the district court in these three consolidated cases be amended by allowing a privilege on all the property provisionally seized and attached therein, and for the amounts adjudged to be due in each suit respectively, and that as thus amended they be affirmed with costs.

No. 492.

SUCCESSION OF E. HART. Opposition of CORNELIA HART, Tutrix.

The Public Administrator, in this instance, is only entitled to two and a half per cent. commissions on the collections he made. He was acting in the capacity of an ordinary administrator under appointment of the court. His pretensions to five per cent. commissions on the whole appraised value of the estate are extravagant. The preceding administrators who were in office four years and who had virtually closed the administration, were allowed two and a half per cent. on the amount of the inventory. For the brief space of his administration during which there were but a few simple acts to be performed, his charge of five per cent. commissions on the whole value of the estate is totally unwarranted by law. In creating the office of public administrator, the Legislature can not have intended to sanction the spoliation of successions.

A PPEAL from the Parish Court, parish of Caddo. *Cresswell, J. Land & Taylor*, for opponent and appellee. *Kilpatrick & Pegues*, for administrator and appellant.

TALIAFERRO, J. The Public Administrator of the parish was appointed to administer the estate of Hart, upon the death of Hoss and Elder, who were appointed to that office upon the opening of the succession and who continued their functions until the period of their respective deaths. Elder died in December, 1872, and Hoss in September, 1873. During an administration of nearly four years, all the debts, with but few exceptions were paid. At the time of the death of Hoss, a suit was pending in the Supreme Court for the estate between Cornelia Hart, widow of deceased and tutrix of her minor children, and the collateral kindred of E. Hart. The estate being solvent, no further administration was necessary after the recognition and putting in possession of the heirs which took place in the spring of 1874.

The Public Administrator about that time, in conformity with the decree of the Supreme Court, surrendered the property to the heirs and filed his final account. He charged five per cent. commissions on the amount of the inventory \$68,308 50, less \$409 50 cash received, leaving a balance of \$3,005 92. He charges himself with \$606 25, amount of rents received for the year 1873. He then credits himself with the sum of \$71 25, cash paid out, and \$125 50 amount account of one Smith, leaving a balance of \$409 50, taken as above stated from the amount of commissions charged. He puts down as privileged claims:

Succession of Hart.

Smith, for repairs \$125 50; Gilmore, auctioneer \$15 25; Crain, for survey \$77; Hatch, clerk ———; unpaid ———; telegram for advertising this account \$6.

Cornelia Hart, tutrix, opposed this account in several of its items as follows, viz: surveyor's fees, greater than allowed by law. The item \$125 allowed Smith, the same not being due as lessee of the Hart Island plantation. She opposes the account because the administrator does not charge himself with commissions received by him on collections in suits of Hoss and Elder administrators *v.* George J. Jones, amounting to about \$250. She opposes the charge of five per cent. commissions on the amount of property mentioned, because, first—the succession had been previously administered three or four years by Hoss and Elder co-administrators; second—because the administration of the Public Administrator was only a partial and temporary one from October, 1873, to March, 1874, and during that brief period performed only a few acts of simple administration; third—that it is only in cases where a public administrator opens, fully administers and closes a succession, that he is allowed five per cent. commissions.

On the trial of the opposition in the court below, it was sustained as to the five per cent. commissions claimed on the amount of inventory. The administrator was allowed \$239 80, as five per cent. commissions on collections during his administration, and the further sum of \$606 25, amount of rents received as compensation for his partial administration, making the full sum of \$845 05.

From this judgment the administrator has appealed. The opponent asks an amendment of the judgment in this court.

We think the administrator entitled only to two and a half per cent. commissions on collections. He was acting in the capacity of an ordinary administrator under appointment of the court. His pretensions to five per cent. commissions on the appraised value of the estate were extravagant. The administrators who were in office four years and who had virtually closed the administration were allowed two and a half per cent. on the amount of the inventory. For the brief space of his administration during which there were but a few simple acts to be performed, his charge of five per cent. commissions on \$68,308 50 is totally unwarranted by law. We are as incredulous as the judge *a quo* who could not believe that the legislature, in creating a public office for public purposes, intended a "spoliation" of successions. The amount allowed as commissions for collections, viz: \$239 80, we reduce to half that sum.

It is therefore ordered that the judgment of the Parish Court be amended by reducing the allowance of \$239 80 as commissions for collections to \$119 90 and as thus amended that the judgment be affirmed.

James v. Mrs. M. J. Lewis and Husband.

No. 481.

PETER JAMES v. MRS. M. J. LEWIS and HUSBAND.

Where it appears that the husband of the defendant, who is separate in property from her, was authorized to employ servants for the hotel kept by the defendant and in which she resides, to settle with them and to pay their wages, and that he had general superintendence and sole control and management of the hotel;

Held—That this authority included the power to make a note for the wages due to servants employed in the hotel.

Even without specific powers the agent can bind the principal by drawing bills and signing notes where it is necessary to raise funds to carry into effect the main object of the agency, *A fortiori*, would he have authority to acknowledge a debt due to the employe of a hotel whom he was authorized to employ and to settle with.

The instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, but not of one year, would be applicable.

It being proved that the defendant resided at the hotel during the term the services were rendered by the plaintiff, it must be presumed that she was informed of what her agent did in regard to the settlements with the servants in her employ, and that she ratified his acts, as it is not shown that she ever repudiated them—the plaintiff continuing in her service after the note was given.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. J. & S. D. McEnery*, for plaintiff and appellee. *Cobb & Gunby*, for defendant and appellant.

LUDELING, C. J. The plaintiff sues Mrs. M. J. Lewis on a promissory note for \$636 31, signed by Mr. Lewis, the husband of the defendant. The note is subject to a credit of \$100. It is alleged and proved that Mrs. Lewis was separated in property from her husband; that she was the proprietress of the hotel in which the plaintiff was employed, and that the note was given for the wages of the plaintiff, as servant in said hotel, and that Mr. Lewis was the agent of Mrs. Lewis, who employed plaintiff, and who had full control and management of the said hotel.

These facts do not seem to be seriously denied, but it is alleged that the husband had not express and special authority to give that note, and she pleaded the prescription of one year against plaintiff's claim against her for his wages. The defense is without equity, and to sustain it would be to enrich the defendant at the expense of the plaintiff, whose services in her hotel inured to the benefit of the defendant.

It appears that Mr. Lewis was authorized to employ servants for the hotel, to settle with them and to pay their wages; that he had general superintendence and sole control and management of the hotel. This authority, it would seem, included the power to make a note for the wages due to servants employed in the hotel. For "even without specific power, the agent can bind his principal by drawing bills and signing notes, when it is necessary to raise funds to carry into effect the main object of the agency." *Perrotin v. Cucullu*, 6 La. 590; 8 R. 236; C. C. 3000. See also *Leonard v. Hudson*, tutor, 12 An. 840, 377; 4 La. 65; 4 An. 250.

James v. Mrs. M. J. Lewis and Husband.

A fortiori would he have authority to acknowledge a debt due to an employe of the hotel, whom he was authorized to employ and to settle with; and the instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, and not one year, would be applicable. Besides, it is proved that the defendant resided at the hotel during the time the services were rendered by the plaintiff. It must be presumed, therefore, that she was informed of what her agent did in regard to the settlements with the servants in her employ, and that she ratified his acts, as it is not shown that she ever repudiated them.

The plaintiff continued in her service after the note was given, and he has lived in the town where defendant resides, ever since, and it does not appear that he was ever notified that the giving of said note was unauthorized by her. 11 La. 288; 2 R. 1; 6 R. 234; 2 An. 891.

It is therefore ordered that the judgment appealed from be affirmed with costs of appeal.

Rehearing refused.

No. 450.

THOMAS B. KILGORE v. THOMAS N. WILLIS et al.

The authorization to the President of the Claiborne Manufacturing Company to confess judgment was a matter of fact, and this fact it was competent for the defendant to establish by any sufficient evidence. The mere circumstance that the authority was not placed of record in the books of the company does not destroy the fact that it was given, and the party in whose favor the authority was to act could not be deprived of his rights, simply because the officers of the company were negligent in the performance of what was perhaps their duty.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. Egan & Hayes*, for plaintiff and appellee. *T. & J. W. Young*, for defendant and appellant.

MORGAN, J. This case differs from the case just decided, only in this that the authority of the president of the Claiborne Manufacturing Company to confess the judgment does not appear to have been recorded on the books of the company.

But by the charter of the company the president thereof is designated as the officer on whom citation was to be served when the corporation should be sued, and all suits by the corporation were to be brought in the name of the president thereof. If, notwithstanding the provision in the charter, special authority was necessary to enable the president to confess judgment, we think it sufficiently established by parol testimony, which we think was competent evidence that such authority was expressly given. The authorization was a matter of fact, and this fact it was competent for the defendant to establish by any suffi-

cient evidence. The mere circumstance that the authority was not placed of record in the books of the company does not destroy the fact that it was given, and the party in whose favor the authority was to act could not be deprived of his rights, simply because the officers of the company were negligent in the performance of what was, perhaps, their duty.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed and that the injunction herein be dismissed.

No. 452.

SUCCESSION OF MARY A. GEE. Opposition of heirs to the application of Public Administrator for administration.

The fact of a husband being the bearer of an act which he presented as his wife's power of attorney to himself, and acting as her attorney in fact under it, might be shown, in order to establish his authorization to her, after it was distinctly proved that the wife signed the act.

In this case the judgment of the court *a qua* appointing the public administrator to administer the succession was erroneous. It was not a vacant succession. There were no debts against the estate—the heirs were represented according to law and were claiming to be put in possession. Under this state of facts his functions were not required.

APPEAL from the Parish Court, parish of Claiborne. *Scott, J. J. & J. W. Young*, for the applicant and appellee. *Egan & Hayes*, for opponents and appellants.

TALIAFERRO, J. Mary A. Gee died on the eleventh December, 1873, in the parish of Claiborne, intestate, leaving in that parish a succession appraised by inventory to near seven thousand dollars, and it does not appear there were any debts against it. The decedent left no heirs in the ascending or descending line. On the thirteenth of the same month the public administrator of the parish made application to the parish court to be appointed to administer the succession, alleging as grounds for his appointment, that Mrs. Gee “died without leaving any will, and left no heirs present or represented.” There was no allegation of indebtedness. On the twenty-ninth of the same month two nieces of the decedent and a nephew, a minor (who is represented by a guardian), made opposition to the appointment of the public administrator, alleging themselves to be the sole heirs of the deceased. The nieces are married women. At the date of the filing of the opposition all the heirs were represented by an agent and attorney in fact, and also by attorneys at law. The proof of the rights of these opponents as heirs of this succession is fully made out. The power of attorney of Mrs. Haring, one of the heirs, to her husband, was objected to on the ground that there was no written authorization of the husband to the wife to sign her name to the act.

Succession of Mary A. Gee.

The opponent, Mrs. Haring, by her counsel offered to prove that the husband had brought the power of attorney to the State himself and had acted under it, the signature of Mrs. Haring to the power of attorney being first proved. The court excluded the evidence offered to prove an authorization and rejected the instrument. A bill of exceptions was reserved. The judge, we think, erred. The fact of the husband being the bearer of the act, presenting it as his wife's power of attorney and acting as her attorney in fact under it, might be shown to establish his authorization after it was distinctly proved that the wife signed the act. The opposition of the heirs was overruled and the public administrator appointed to administer the succession.

The judgment is erroneous. This was not a vacant succession; there were no debts against the estate; the heirs were represented according to law and were claiming to be put into possession. Under this state of facts the public administrator had no right to take the estate under administration. In such a case his functions are not required and his appointment was irregular and illegal.

It is therefore ordered that the judgment of the parish judge appointing the public administrator to administer the succession of Mary A. Gee, deceased, be annulled, avoided and reversed. It is further ordered that the opponents be recognized as the legal heirs of said decedent, and put into possession as such; the public administrator, in his individual capacity, paying all costs of this suit.

No. 439.

SIMON B. MILLER v. M. C. MOSELEY.

The nonpresentation of a check within a reasonable time may, under the circumstances of the case, amount to such laches as will release the indorser thereof.

A PPEAL from the Eighteen Judicial District Court, parish of Webster. *Turner, J. Watkins & Fort*, for plaintiff and appellant. *A. B. George*, for defendant and appellee.

HOWELL, J. This is a suit by the holder against the indorser of a check, drawn at Holly Springs, Mississippi, December 21, 1872, by the Holly Springs Savings and Insurance Company on the Crescent City National Bank of New Orleans, Louisiana, the defense to which is a release by the laches of the plaintiff in not presenting the check in due time and withholding it from circulation until the bank had failed.

The check was drawn to the order of defendant, who received it by mail in the early part of January, 1873, and on the first of February following sold and specially indorsed it to plaintiff, who retained it in his possession in Minden, Louisiana, until March 28, and it was pro-

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tested for nonpayment on third April following. The bank suspended on March 17, at which time the drawers had over \$1400 on deposit, considerably more than the amount of the check, and it is proved that the check would have been paid if presented at any time from first of January to seventeenth March, when the bank failed. No good reason is shown by plaintiff for holding the check from first of February to twenty-eighth March, and we must consider it such laches as to release the defendant under the circumstances. The fact that the defendant had held it for nearly a month before selling it to the plaintiff, will not inure to the benefit of the plaintiff, if the latter had reasonable time to present the check for payment before the failure of the drawees; and we think it clear there was such. And the very doubt, which the plaintiff says he expressed at the time of purchasing the check, should have induced him to present it for payment promptly. The alleged guarantee made at the time, by defendant, as described by the plaintiff, did not authorize the latter to hold the check such an unreasonable length of time. The defendant did not warrant the indefinite or perpetual solvency of the drawees.

Judgment affirmed.

No. 470.

R. C. & M. OGLESBY v. M. P. RENWICK & Co.

The judge *a quo* erred in not permitting it to be proved that an account which had been settled by a note was incorrect. Notwithstanding the note, the party interested had the right to show that the account upon which it rested was not right.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiffs and appellees. *Morrison & Farmer*, for defendant and appellant.

MORGAN, J. D. C. Moyan alone appeals from the judgment rendered against the firm of W. P. Renwick & Co., of which firm he was a member.

Some of the transactions between M. Oglesby and the defendant were settled by a note. Subsequent to this settlement, R. C. Oglesby entered into partnership with M. Oglesby. On the trial, Moyan attempted to prove that the account which had been settled by note was incorrect. He was not allowed to do so on the ground that the account had been closed by note, and on the further ground that the note was made in favor of M. Oglesby, and not R. C. & M. Oglesby. We think our brother erred. R. C. Oglesby can not be considered a third party and innocent holder of the note for value, and, notwithstanding the note, Moyan had the right to show that the account upon which it rested was incorrect.

R. C. & M. Oglesby v. Renwick & Co.

Moyan offered also to prove that when the account was presented to him, he pointed out items amounting to some \$2000, charged thereon, which bore date previous to the existence of the partnership of Renwick & Co. This was refused for the reason that these accounts had all been closed by note after the date named, and its correctness could not now be inquired into. We think the judge erred. The testimony should have been received.

It is therefore ordered, adjudged and decreed that the judgment of the district court, as regards the defendant, D. C. Moyan, be avoided, annulled and reversed, and that the case be remanded for a new trial, plaintiffs to pay costs of appeal.

No. 459.

MARGARET S. POOL v. ANNIE ALEXANDER AND HUSBAND.

The plaintiff sold her interest in her father's succession to her co-legatee and consequently co-owner, who is the defendant in this case, and in the enjoyment of that interest it is not pretended that said defendant has been disturbed. It matters not whether that interest was a third or a half. The purchaser has received all that she purchased, to wit: the interest, whatever it is, and she must pay the price she has agreed to. It can not be seen under what error of law, as alleged, the defendant could have been, when making the purchase.

The plea of want of consideration is not well founded. The plaintiff did not sell any slave, but only whatever interest she might have in her father's estate. Besides, in 1867, the date of the defendant's purchase, there were no slaves to buy or to sell.

After the plaintiff sold all her interest in the succession of her father to the defendant, she had nothing to do with whatever debts of the succession the defendant chose, or was compelled to pay. There was no error in the judgment which passed over in silence the defendant's reconventional demand. To give judgment in favor of the plaintiff for the amount claimed, was practically to dismiss the reconventional demand—which dismissal the evidence justifies.

The judge *a quo* did not err in refusing to allow the defendant to submit her pretensions on her reconventional demand to a jury. The suit being on a promissory note and no fraud being set up as a defense, no jury was allowed by law to try the issue. Reconvention is an incidental demand. If the principal action could not be submitted to a jury, neither could that which was an incident thereto.

It is too late to enter a remittitur after an appeal has been granted. After the judgment was signed, it could only be corrected on appeal.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiff and appellee. *S. G. Parsons*, for defendant and appellant.

MORGAN, J. Plaintiff claims from the defendant \$1518 75, balance due on a note of \$4000. She also asks to have her hypothecary rights upon a certain piece of property, given to secure the payment of the sum due her, recognized. The defense is error of law and want of consideration.

Plaintiff's father, at his death, left a widow and two children. The property he owned at his decease was community property. By will

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he divided his estate between his widow and his children, giving to each a third part thereof. His property consisted in land, slaves and personal property. He died in 1863. No effort was made to attack the will. The legatees seem to have acquiesced in its provisions. On the fourth January, 1867, plaintiff sold her interest in her father's succession to his widow, the present defendant. The executor's account had, at that time, been presented and homologated, after which it would seem that the heirs took possession of the estate. Bussey, a witness, swears that he thinks they did. Parsons says that upon the rendition of the account the property was turned over to the heirs and those who represented them, and that the executors were discharged.

The alleged error of law and want of consideration is this: The defendant says that the property left by her husband was community property, of which she was the owner, in her own right, of the one-half, and that plaintiff could only sell her the one-third of the one-half thereof, instead of the one-third of the whole. Consequently she contends that, as the plaintiff sold her more than she had title to, she, the defendant, was in error of law when she purchased more than the plaintiff had to sell. The proposition seems to us untenable.

The plaintiff sold her interest in her father's succession, whatever that interest might have been. She sold to her co-legatee, and consequently co-owner. Whether that interest was a third or a half matters not. It was not a certain number of acres of land, or a certain quantity of movables which she sold, but her interest in the succession of her father, and in the enjoyment of this interest it is not pretended that she has been disturbed. We can not see under what error of law the defendant could have been laboring when she made the purchase. Even if she was in error, this error was not the only or principal cause of her contract, and would not, therefore, either invalidate the sale or entitle her to a diminution of the price. C. C. 1846. She has received everything which she purchased, and she must pay the price which she agreed to pay therefor.

Another want of consideration urged is that the plaintiff sold her interest in the negroes, which formed a portion of her father's estate. This is not the sale of a slave. In 1867, the date of the defendant's purchase, there were no slaves to buy or to sell. Whatever interest she had she sold, and the defendant bought nothing else.

There was no error in the judgment which passed over in silence the defendant's reconventional demand. To give judgment in favor of the plaintiff for the amount claimed is, practically, to dismiss the reconventional demand, and this the evidence satisfies us was proper, as there is nothing in the record which would authorize a judgment in defendant's favor on that demand. Admitting everything which she

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alleges to be true in this regard, after the plaintiff sold all her interest in the succession of her father to the defendant, she had nothing to do with whatever debts of the succession the defendant chose, or was forced to pay. Neither do we think the judge erred in refusing to allow the defendant to submit her pretensions, on her reconventional demand, to a jury. The suit being on a promissory note and no fraud being set up as a defense, no jury was allowed by law to try the issue. Reconvention is an incidental demand. If the principal action could not be submitted to a jury, neither could that which was an incident thereto be. There is error in the judgment in this, that it gives more to the plaintiff than she claimed in her petition. This error was sought to be corrected, and a remittitur was entered for the excess. But this remittitur was entered after an appeal had been granted. This was too late. After the judgment was signed it could only be corrected on appeal. But this error can be corrected here.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended by reducing the same to fifteen hundred and eighteen dollars and seventy-five cents, with interest as claimed in plaintiff's petition. The costs of the court below to be paid by the defendant, those of the appeal to be paid by the appellee.

Rehearing refused.

No. 508.

CITY OF SHREVEPORT v. L. A. LEVY.

Before the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void.

A PPEAL from the Recorder's Court, city of Shreveport, parish of Caddo. *Wheaton*, recorder. *Nutt & Leonard*, for defendant and appellant.

MORGAN, J. The defendant appeals from a judgment condemning him to pay a fine of ten dollars for having violated an ordinance passed by the authorities of the city of Shreveport. The ordinance violated provides that all business houses in the city of Shreveport shall be closed on Sundays from and after nine o'clock A. M., and that it shall not be lawful for any persons doing business in that city to sell anything in the usual course of their business during the time and hours above mentioned, provided that this ordinance shall not apply to drug stores, hotels, barber shops, restaurants and livery stables. If the ordinance stopped here, perhaps it might do very well. But it goes on and provides further that it shall not apply to any person or per-

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sons doing business in the city who close up their places of business on Saturdays, and keep them closed during the whole day.

It is admitted in the record that a large proportion of persons engaged in mercantile pursuits in the city of Shreveport are Jews, many of whom observe the Jewish Sabbath. Before the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void.

It is therefore ordered, adjudged and decreed that the judgment of the Recorder's Court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, with costs in both courts.

No. 434.

J. F. PARGOUD v. MRS. SARAH RICHARDSON.

The stamping of the note sued upon was not necessary as the act accompanying the note was stamped.

The objection that the note was not presented at the place of payment at its maturity, according to the agreement of parties, is not fatal. This agreement is not a stipulation in the act of sale and mortgage connected with the note, but was added to the note some time after its date, and authentic proof of a compliance therewith can not be required.

The alleged insufficiency of the stamps, amounting to fifty cents on the act of mortgage, does not invalidate the writ of seizure and sale issued on the evidence of said mortgage act; it is on the authenticity of the evidence that such a writ is based. Here the evidence was authentic, and therefore the order properly issued. If the defendant was injured by the proceeding, she has not adopted the remedy by which her injuries could be inquired into.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. S. D. McEnery, Cobb & Gunby*, for plaintiff and appellee. *Morrison & Farmer*, for defendant and appellant.

MORGAN, J. We are asked to dismiss this appeal on the following grounds:

First—That by taking an appeal in the suit in which the appellant enjoined the order of seizure and sale from which the appeal is taken, appellant lost all right to appeal from the order.

Second—That by this appeal we are required to decide the same case twice, while it was the duty of the appellant to set up all her defenses in the injunction suit.

The grounds set up in the injunction suit are not the same as are presented in this case. The motion must therefore be denied.

ON THE MERITS.

It is first objected that the note sued on is not stamped. This was not necessary as the act accompanying the note was stamped.

Pargoud v. Mrs. Sarah Richardson.

It is next objected that the note was not presented at the place of payment at its maturity, according to the agreement of the parties. This agreement is not a stipulation in the act of sale and mortgage, but was added to the note some time after its date, and authentic proof of a compliance therewith can not be required, as seems to have been considered necessary in the case of *Moss v. Byrne*, 12 La. 615. Third, the act of mortgage used as evidence to obtain the writ is not binding as a mortgage, and the courts are prohibited by the laws of the United States from admitting it in evidence, because it is not stamped as required by the internal revenue laws of the United States, and the evidence is otherwise insufficient to authorize the writ. The alleged insufficiency of stamps amounts to fifty cents.

It is the authenticity of the evidence upon which an order of seizure and sale issues. Here the evidence was authentic. This being the case the order properly issued. If the defendant was injured by the proceeding, she has not adopted the remedy by which her injuries could be inquired into.

Judgment affirmed.

No. 455.

T. S. DUGAN et al. v. POLICE JURY OF THE PARISH OF ST. CHARLES et als.

Plaintiffs have failed to allege or show the amount of their interest as tax payers in the matters involved in this suit, and hence the motion to dismiss this appeal for want of jurisdiction must prevail.

The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars does not show such interest as to give this court jurisdiction.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Durrapau*, parish judge, acting in the place of *Flagg*, district judge, who recused himself. *M. Marks*, for plaintiffs and appellants. *F. B. Earhart*, *J. D. Augustin*, *N. St. Martin*, parish attorney, for defendants and appellees.

HOWELL, J. The plaintiffs, as taxpayers in the parish of St. Charles, set out the extravagant and wasteful administration of the financial affairs of said parish by the police jury, and their illegal issue of parish warrants and certificates of indebtedness in negotiable form, and prayed to enjoin the police jury, the parish tax collector and treasurer from paying the said warrants or receiving them in payment of parish taxes, but failed to allege or show the amount of their interest as taxpayers in the matters involved, and hence the motion to dismiss this appeal for want of jurisdiction must prevail.

Dugan et al. v. Police Jury of the Parish of St. Charles et als.

The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars, does not show such interest as to give this court jurisdiction.

The questions and interests involved are doubtless of vast and serious importance to the inhabitants of St. Charles parish and the public generally; but howsoever disposed we may be to grant relief in such cases, the parties who appeal to the judiciary department must show in some way that the matter involved as to themselves will give jurisdiction of their demand to the tribunal to which they apply for relief. Our jurisdiction, as fixed by the constitution, not appearing from the record before us, we are not authorized to pass on the issues presented.

It is therefore ordered that this appeal be dismissed at costs of appellants.

No. 491.

A. L. SLACK, Administrator, v. JAMES S. RAY, Assessor and Collector.

Section 25 of the charter of the city of Monroe, confers full authority on the city to assess and collect taxes and to impose penalties for non-payment of taxes. The grant of full power to tax carries with it authority to use all means necessary to accomplish the object; and the imposition of penalties after due notice for non-payment of taxes, is a legitimate means of collecting revenue. The State can confer this power because there is no limitation in the constitution inhibiting it.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution and void. The title of the charter is "an act to incorporate the city of Monroe, to fix its boundaries, to provide for the government," etc. The statute would fail to provide for the government of the city of Monroe, if it failed to authorize the levy and collection of taxes for the support thereof.

A PPEAL from the parish court, parish of Ouachita. *Baker, J. A. L. Slack, in propria persona*, plaintiff and appellee. *W. W. Farmer*, city attorney, for defendant and appellant.

WYLY, J. The plaintiff enjoined the tax collector from selling certain property belonging to the succession represented by him for taxes due the city of Monroe for the year 1873, and also for the penalties for non-payment of said taxes.

The court dissolved the injunction as to the taxes, but maintained it in relation to the penalties.

From this judgment the defendant, the tax collector, has appealed.

That the State can collect taxes and impose penalties for non-payment thereof, after giving due notice, was recently decided by this court in several cases, especially in the case of *Morrison v. Larkin*, tax collector. Indeed, the proposition is not denied by the plaintiff.

It is denied, however, that this right has been conferred on the city

Slack, Administrator, v. Ray, Assessor and Collector.

of Monroe by the State; and, therefore, the defendant has no authority to sell the property of the plaintiff.

Looking to the charter of Monroe we find section 25 which provides:

“That for the purpose of levying and collecting taxes and licenses, the Mayor and City Council are hereby invested with full power to pass all laws, not inconsistent with the Constitution of the United States or of this State, to compel the payment by compulsory process, of all taxes or licenses which may be due; and they are hereby authorized to confer on the assessor and collector power sufficient to carry into effect the laws and ordinances pertaining to the levying and collecting of such licenses and taxes.” Acts 1871, p. 242.

We think this section confers full authority on the city of Monroe to assess and collect taxes, and to impose penalties for non-payment of taxes.

The grant of full power to tax, carries with it authority to use all means necessary to accomplish the object; and the imposition of penalties after due notice for non-payment of taxes, is a legitimate means of collecting revenue; and it is a means employed by the State in collecting its taxes.

The State can confer this power because there is no limitation in the constitution inhibiting it.

As the State can collect, in a summary manner, its taxes and the penalties for non-payment thereof after due notice, it can confer the same power on the political corporations which it employs in administering the government.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution and void.

The title of the charter is: “An act to incorporate the city of Monroe; to fix its boundaries; to provide for the government, and create a recorder's court for the same.”

The statute would fail “to provide for the government” of the city of Monroe, if it failed to authorize the levy and collection of taxes for the support thereof. There are other objections, but they are without weight.

It is therefore ordered that the judgment appealed from be amended so as to dissolve entirely the injunction sued out by the plaintiffs, and as amended that it be affirmed, appellee paying costs of both courts.

Rehearing refused.

No. 469.

J. H. BRIGHAM, Curator, v. A. L. BUSSEY et al.

26	676
44	87
26	676
48	325
26	676
108	188
108	188

It is a rule of our jurisprudence that if a shorter prescription is not specially applied to personal actions, they are not prescribed by two years. There is no law fixing specially the prescription of actions against recorders.

This is an action against the recorder of the parish of Morehouse and the securities on his official bond for the damages resulting from a failure of official duty by the deputy recorder in not reinscribing a certain judgment within the proper time, as he, the deputy, was specially instructed to do, by which omission the debt due plaintiff was lost. This action is one *ex contractu*.

The recorder had a special duty to perform, embraced within the obligation of his bond given according to law with two good securities, and his failure or that of his deputy, duly appointed to perform that duty, is a breach of his bond on which he and his deputies may be sued.

The argument that it is not an action on the bond, because it is not established that the consent of the sureties was given to the appointment of the deputy, which was necessary to make them liable, and that its omission shows the action to be one against the recorder alone for his negligence, is not sound. It might perhaps result in releasing the securities on the trial, but can not change the character of the action.

Damages *ex delicto* flow from the violation of a general duty; damages *ex contractu* are the consequence of the breach of a special obligation, such as the special obligation imposed by law on the recorder, in this case, to reinscribe a certain judgment.

The recorder and his securities had entered into a specific contract with the State, for the benefit of those interested, that he and his deputy would faithfully perform each duty of his office, and his failure in such respect is a breach of that contract. The action to which it gives rise is not prescribed by one year.

In this case, the deputy recorder *promised* to perform a special duty as requested on behalf of plaintiff, and the latter had the right to suppose the promise and duty would be observed by the officer. The failure of the plaintiff to go afterwards (as it would have been prudent for him to do) to see that the officer had done his duty, is not such a negligence, under the circumstances, as to affect his right of action against the defendants. The other allegations of negligence against the plaintiff have no force.

The objection that plaintiff or his attorney should have furnished the recorder with a certified copy of the judgment for reinscription and tendered the fee, if of any force under the circumstances, is removed by the promise of the deputy to make the inscription without requiring such copy or fee.

The argument, on behalf of the sureties, that they can not be condemned to pay, because the recorder did not obtain their written consent to the appointment of the deputy, as provided by law, can not avail one of the securities who is himself the deputy. As to the other, the matter should have been specially pleaded. It is raised for the first time, in this court, under the general issue.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. Jury trial. Todd & Brigham, for plaintiff and appellee. Morrison & Farmer, Newton & Hall, James Bussey, for defendants and appellants.

HOWELL, J. This is an action against A. L. Bussey, as recorder of the parish of Morehouse, and the sureties on his official bond, for the damages resulting from a failure of official duty by the deputy recorder in not reinscribing a certain judgment within the proper time, as he, the deputy, was specially instructed to do, by which the debt due plaintiff was lost.

To this action, under a general denial, the prescription of one year is opposed.

It is a rule of our jurisprudence and law that if a shorter prescription is not specially applied to personal actions, they are prescribed by two years. We are referred to no law, and we know of none, fixing specially the prescription of actions against recorders; but it is contended that this is an action for a quasi offense, and therefore prescribed by one year.

In our opinion the action is one *ex contractu*. The recorder was required by law to enter into a bond with two good sureties for the faithful performance of his official duties, and the law made it his duty to reinscribe the judgment when duly called on to do so. It was then a special duty embraced within the obligation of his bond, and his failure or that of his deputy, duly appointed, to perform that duty is a breach of his bond, on which he and his sureties may be sued therefor. It is only through or by the bond that the sureties have any connection whatever with the acts or omissions of the recorder and his deputy. The argument that it is not an action on the bond, because it is not shown that the consent of the sureties to the appointment of the deputy, which are necessary to make them liable, and its omission shows the action to be one against the recorder alone for his negligence, is not sound. It may perhaps result in releasing the sureties on the trial, but can not change the character of the action.

We concur in the opinion that Mr. Marcadé has, in his commentary on the Napoleon Code, "developed the distinction between damages *ex delicto* and damages *ex contractu* with his usual brevity and felicity. The former flow from a violation of a general duty, the latter from the breach of a special obligation." It was the general duty of the recorder to do right—not to discharge the duties of his office in a violent or oppressive manner—to observe the "precepts of the law;" but it was his special obligation imposed by the law to reinscribe the judgment in question when required by a party in interest to do so. He and his sureties entered into a specific contract with the State for the benefit of those interested, that he and his deputy would faithfully perform each duty of his office; and his failure in such respect is a breach of that contract. If this is not a case in which the bond may be enforced, it is difficult to imagine one in which official bonds may be made available. We therefore conclude that this action is not prescribed by one year.

The next important question—the first on the merits—is, was the recorder or his deputy (for instructions to either is sufficient), instructed or directed in due time to reinscribe the judgment?

The contest is between a curator of a succession as plaintiff and the recorder, his deputy and sureties as defendants. The deputy, Naff, who was actually discharging the duties of the office, swears positively

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that neither the plaintiff, his attorney nor any one else ever requested or directed him to make the reinscription. This is a denial by a party to the suit, made evidence by the law. On the other hand, Todd, one of the attorneys, of the plaintiff, swears as positively that he did give the instructions and describes the circumstances of his doing so; stating that he opened the book of judicial mortgages, turned to the page where the judgment was inscribed, and directing the attention of the deputy specially to it, requested him not to fail to reinscribe it, which the latter promised to do. Here is a direct mention of the details, the particular acts, which a witness, not a party to the suit, says he recollects distinctly. He also states that he informed the plaintiff of his action in the matter, and the latter states further, in this connection, that on that occasion his attorney first inquired of him if he had caused the reinscription to be made, and upon his, plaintiff's, starting immediately to have it done, his counsel told him he need not go, as he, the counsel, had just ordered it to be done. This shows at least that the matter was thought and spoken of by those parties at the time, and served to fix it in their memories. As a part of the *res gesta* this evidence was admissible. The jury and judge had these witnesses before them and gave credence to the testimony for the plaintiff, and we think it has the preponderance, and that Naff, the deputy, was guilty of the neglect of official duty as charged.

A third question is presented. If Naff was guilty of neglect, did not the negligence of plaintiff contribute to the loss and thus deprive him of the right to recover?

Ordinarily the contributory negligence must relate to or be connected with the act or event which causes the damage, and it is not pretended that any act of plaintiff contributed to the occurrence of the failure on the part of the deputy to reinscribe the judgment; but it is urged that it was the duty of the plaintiff to see that the inscription had been made as directed, and the cases in 2 An. 547, 6 An. 172 and 7 An. 65 are cited in support of this position. Those cases refer to the duties of creditors with such real rights, as they affect or relate to third persons, and not to the duties and rights as between the creditor and the delinquent officer. In this case the deputy recorder promised to perform a special duty, as requested, on behalf of plaintiff, and the latter had a right to suppose the promise and duty would be observed by the officer.

The failure of the plaintiff to go afterwards (as it would have been prudent in him to do) to see that the officer had done his duty, is not such negligence, under the circumstances as to affect his right of action against the defendants.

It is also urged, in this connection, that the plaintiff was negligent

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in not speedily settling the estate he was administering and enforcing the special mortgage at a time when it might have paid the debt; in not recording the revised judgment and in not resorting in time to and prosecuting promptly hypothecary actions against the various properties affected by the judicial mortgage.

Conceding that these points are properly raised in the record where only the general issue is presented, no such negligence exists on the part of plaintiff, as to relieve these defendants from their liability. Within the legal delay the deputy recorder was instructed and he promised to reinscribe the judgment, as authorized by law, the judgment was revived as required by law, and it is shown that, at the time, there was property subject to the judicial mortgage, which plaintiff could have purchased, but for the peremption of the mortgage, which mortgage he had a right, within ten years, to have reinscribed.

The objection that plaintiff or his attorney should have furnished the recorder with a certified copy of the judgment for reinscription and tendered the fee, if of any force under other circumstances, is removed by the promise of the deputy to make the inscription without requiring such copy or fee.

It is contended, in behalf of the sureties, that they can not be condemned to pay because the recorder did not obtain their written consent to the appointment of the deputy as provided by section 3075 Revised Statutes.

This can not avail one of the sureties who is himself the deputy. He certainly consented to his own appointment. As to the other, we think the matter should have been specially pleaded. *Non constat*, if the point had been made in the defense, the plaintiff could have shown that the provisions of said section were complied with. It is raised for the first time here under the general issue.

Under all the circumstances presented in this record, we are not prepared to differ from the judge and jury below in their conclusion. We see no good cause to amend the judgment.

Judgment affirmed.

LUDELING, C. J., *dissenting*. This is a suit to render a recorder and his securities liable for the amount of a judgment which it is said he was instructed to record and he failed to do so. The evidence to establish this responsibility should be strong, clear and conclusive.

The only evidence in this case in favor of plaintiff is the testimony of R. B. Todd, Esq., the attorney who obtained the postponement. His testimony is that he instructed the recorder, verbally, to re-register the judgment at the same time that he told him to re-register another

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judgment in another case, which latter judgment was re-registered. This the deputy recorder positively contradicts in his testimony. The declarations of Mr. Todd to his law partner, made just after these instructions to the deputy recorder were given, and made out of the presence of the recorder, were offered and received in evidence. I am inclined to the opinion that they should have been excluded for the reasons urged against their reception in the bill of exceptions—that it was hearsay.

But if the evidence be regarded as legal, because a part of *res gestæ*, still I can not perceive how that strengthens the plaintiff's case—it is still only the unsworn declarations of Mr. Todd, whose testimony was already in the case. And we have the testimony of Mr. Todd opposed by the testimony of Mr. Naff—both unimpeached and both interested in the result. I have no reason to doubt the veracity of either witness, and the only hypothesis upon which both witnesses swore truthfully, is that Mr. Todd told Naff to re-record the judgment, but Naff did not hear, or did not understand him. I must infer this to have been the case, as the deputy recorder did register the one judgment and failed to re-register the other. He had no motive for not recording the judgment, whereas his interest in the fee for recording would have induced him to do it, if not his official duty. Besides, the presumption of the law, that every officer does his duty, is in his favor.

Upon the hypothesis aforesaid, who was to blame? I maintain that it is the party who gave the verbal instructions, unaccompanied by a copy of the judgment to be recorded, or any written memorandum. Besides, it appears that the loss sustained was by the peremption of the mortgage, through the delays of the plaintiff, occasioned either through negligence or a disposition to favor his debtors. He has, therefore, himself contributed to the loss, and the jurisprudence of this State is well settled, that one, whose negligence has contributed to an injury or loss, has no right to claim indemnity. 14 An. 524; 1 An. 374; 17 La. 391; 23 An. 464; 24 An. 464; and case against City Railroad Company recently decided at New Orleans.

In June, 1869, plaintiff instituted the hypothecary action on this judgment, and though no answer was filed or defense of any kind was made until May 23, 1871, no effort appears to have been made to make the judgment by default final, although the mortgage was not perempted until third July, 1870, and in the interim at least two terms of the court were held.

I therefore dissent from the opinion of the court.

Mahle et al. v. Elder et al.

No. —.

MAHLE et al. v. ELDER et al.

This is a suit to recover a certain piece of land on the ground that the plaintiffs were unjustly deprived of it by illegal proceedings, among which was a certain compromise executed by their tutor. All the proceedings complained of were duly homologated and confirmed. The power to effect the compromise was conferred upon the tutor by a family meeting. The clerk, in rendering the order of homologation, had the authority to order the tutor, in pursuance of the directions of the family meeting, to carry out the compromise. The authorities in support of transactions of this kind are numerous in our own jurisprudence.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *J. C. Moncure*, judge *ad hoc* in the place of *Looney*, district judge, recused. *A. W. O. Hicks & N. C. Blanchard*, for plaintiffs and appellants. *Land & Taylor*, for executors. *Egan, Williamson & Wise*, for defendants and appellees.

TALIAFERRO. J. This is a suit brought by plaintiffs as heirs of one John H. Mahle, who died in January, 1845. Nancy Mahle, his wife and mother of plaintiffs, died in August, 1847. It seems that in 1843 John K. Elgee, of the parish of Rapides, sold the land which these heirs are now suing to recover to John H. Mahle, together with a number of slaves for \$11,600, for which Mahle executed his notes, payable in eight annual installments with ten per centum interest per annum after maturity, secured by special mortgage and vendor's privilege on all the property conveyed. After the death of Mahle and his wife, the eldest of the children, John W. Mahle, qualified as tutor to the minors. During his tutorship proceedings were taken to effect a compromise and settlement of the debt of Elgee by retroceding the property to him. The retrocession was effected and the property, or at least that portion of it now in controversy, was sold by Elgee to the ancestor of the present defendants. The petition alleges that the plaintiffs were illegally and unjustly deprived of the property, that all the proceedings, transfers, etc., of the property they sue for, purporting to convey title thereto, are without effect, as having been executed in contravention of prohibitory laws. They claim two thousand dollars rent and pray to be recognized as the owners of the land sued for, and pray to be put in possession as such. The defendants except that the plaintiffs can not indirectly and collaterally attack judicial proceedings and judgments of courts. They allege title in themselves and plead the prescription of ten and twenty years.

The judgment of the lower court was in favor of the defendants and the plaintiffs have appealed.

We see no substantial grounds upon which the plaintiffs rest their claim to recover the property sued for. They seem to rely mainly upon alleged illegal proceedings resorted to to divest them of title, as

they were minors when the retrocession of the land and slaves was made to Elgee, their ancestor's vendor.

An examination of the record brings us to the conclusion that the proceedings in relation to the retrocession of the property to Elgee were regular and taken with circumspection. The objection that these proceedings were superintended by Elgee himself, and the various legal instruments in the judicial proceedings written by him and signed by the tutor, do not vitiate them. It is fully shown that the ancestor of these claimants, John H. Mahle, had contracted a heavy debt in the purchase of the plantation and slaves from Elgee, the vendor holding a special mortgage and vendor's privilege to secure the payment of the price. Mahle and his wife both died a few years after, leaving the succession burdened with a large debt bearing ten per cent. interest which the estate was utterly unable to pay. Between the tutor of the minors, duly authorized by a family meeting, and the creditor, it seems to have been amicably agreed that the land should be transferred to Elgee, and the notes given up, which was done, and the proceedings necessary to render the transaction legal appear to us from the record to be regular.

It is objected that the clerk had no power to authorize the tutor to make the retrocession to Elgee. The family meeting recommended the retrocession as an act highly advantageous to the minors, authorized it to be carried into effect, and recommended that the tutors of the minors be authorized to carry the compromise into effect. These proceedings were duly homologated and confirmed. The power to effect the compromise was conferred upon the tutor by the family meeting. The clerk in rendering the order of homologation had the authority to order the tutor, in pursuance of the directions of the family meeting, to carry out the compromise.

The authorities in support of transactions of this kind are numerous in our own jurisprudence. 6 An. 2; 7 An. 135; 8 La. 81; 19 La. —; 3 An. 583; and various other authorities. C. C. 348; 15 An. 148.

The law and evidence justify the decree of the lower court.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

MORGAN, J., *dissenting*. Retrocession is alienation. I find no authority which permits the alienation of real estate belonging to minors, as the result of a compromise between their tutor and persons presenting claims against them. The laws are intended to protect those who can not protect themselves. But, practically, it appears that the helpless are always wrong. When the law says that real estate belonging to minors can not be sold except by public auction, I think it meant

 Mahle et al. v. Elder et al.

what it said; and I do not think that their property can be taken away from them except in the way pointed out by law.

In this case the tutor not only reconveyed the property, but he paid money and contracted a debt to enable him to complete the re-rendition. I do not think he had that right, even though his course was sanctioned by a family meeting of the friends of the minors, and ratified by the sanction of the clerk. All of them joined together had not, in my opinion, the right to allow their property to be disposed of except in the manner and form prescribed by law.

I therefore dissent from the conclusions arrived at by the majority of the court.

WYLY, J., *dissenting*. I concur in this dissenting opinion.

 No. 457.

E. D. DUCKWORTH, individually and as administrator, v. ISAAC B. PAYNE et al.

This is a suit by plaintiff, individually and as administrator, to annul a certain order and judgment and the sale of certain lands made by the sheriff to defendant in fraud, as alleged, of the creditors of the succession of which he is the administrator.

The sheriff in his return states that the sale, the validity of which is contested, was advertised by posting at the door of the courthouse and two other public places in the parish, there being no newspaper in the parish selected according to section 15, act No. 8, approved July 24, 1868, to perform, print and publish parochial and judicial advertising. It is only after the official journal is selected and notice thereof given to the sheriff, that his advertisements are null if not published in such journal. No such selection and notice are proven in this case; hence the presumption must be in favor of the officer.

The sale was made on a mortgage created before the provision of the constitution in regard to dividing lands into small lots was put in operation, and therefore can not be affected by it.

The record does not show that the price was less than the first or previous mortgage. But it appears that the only mortgage of an older date than the ones on which the order of seizure and sale issued, was actually owned by the purchaser, plaintiff in the proceedings.

The judge *a quo* did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

The subject of the violation of an alleged agreement not to sell the property, but to cultivate the lands, has already been settled by this court as not being a legal ground for not causing the property to be sold, and *a fortiori*, it is not a good ground to annul the sale.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. Jury trial. S. G. Parsons, for plaintiff and appellee. J. H. Brigham, David Todd, for Isaac B. Payne. Newton & Hall, for R. B. Todd, curator.

HOWELL, J. The plaintiff, individually and as administrator of J. D. Duckworth, sues to annul a certain order and judgment and the sale of certain lands made by the sheriff to defendant, Payne, on first October, 1870, in fraud of creditors of the succession of J. T. Payne, as alleged, on the grounds:

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First—The sale was not preceded by a legal advertisement, in the official journal or otherwise, nor by a legal appraisement.

Second—The land was not sold in lots of ten to fifty acres.

Third—The price bid for the said property was not equal to the previous special mortgage on it, and the provisions of acts 678 and 679 C. P. were not complied with.

Fourth—Isaac B. Payne was not a creditor of the succession at the time of sale.

Fifth—The notes which the land was sold to pay had been extinguished by the proceeds of cotton shipped by J. T. Payne to Fellows, Ferguson & Hervey.

Sixth—Isaac B. Payne had agreed with S. G. Ferguson, curator, at the time the succession was opened that the plantations should not be sold, but cultivated at the expense of the estate, which agreement was violated by the said Payne.

The separate answers of the defendants contain a general denial and an averment of the legality of the proceedings sought to be annulled. From a verdict and judgment in favor of plaintiff the defendants have appealed.

I. The sheriff in his return states that "the sale was advertised by posting at the door of the courthouse and two other public places in the parish, there being no newspaper in the parish selected according to section 15, act No. 8, approved July 24, 1868, to perform, print and publish parochial and judicial printing and advertising."

The only evidence to contradict this is the testimony of one witness, who thinks there was a paper published at the time in the parish, but is not positive, and does not know that it was the official journal. It is only after the official journal is selected and notice thereof given to the sheriff that his advertisements are null if not published in such journal. No such selection and notice are proven, and we must adopt the presumption in favor of the officer. The appraisement appears to be regular.

II. The sale was made on a mortgage created before the provision of the constitution in regard to dividing lands into small lots was put in operation.

III. The record does not show that the price was less than the first or previous mortgage. But it appears that the only mortgage of an older date than the ones on which the order of seizure and sale issued was actually owned by the purchaser and plaintiff in the proceedings. It is not made to appear in what particular the provisions of articles 678 and 679 were not complied with.

The judge did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

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IV and V. The evidence in the record does not impeach the validity of plaintiff's claims on which the order of seizure and sale issued. The proof, uncontradicted, is that the proceeds of the cotton shipped to the factors of the debtor were to be applied first to the open account, which was not itself thereby extinguished.

VI. The subject of the violation of an alleged agreement not to sell the property, but to cultivate the lands, was settled in the case of *Payne v. Ferguson*, 23 An. 581, as not being a legal ground for not causing the property to be sold, and *a fortiori*, it is not a good ground to annul the sale.

After a careful examination of the record, we conclude that the case is with defendants.

It is therefore ordered that the judgment appealed from and the verdict below be set aside, and that there be judgment in favor of defendants, with costs in both courts.

Rehearing refused.

 No. 443.

CHAFFE, SHEA & LOYE v. GEORGE B. ABERCROMBIE.

The plaintiffs purchased in January, 1872, from one Robert Stothard, a certain section of land with the improvements thereon. Joseph Stothard was employed to hold possession for plaintiffs. During the same month the place and improvements were attached at the suit of Laura Stevens against said Robert Stothard and taken possession of by the sheriff who appointed Laura Stevens herself as keeper, and she employed Abercrombie, the defendant to take charge of the place as her agent. The seizure was subsequently released by order of Mrs. Stevens, the plaintiff in the attachment suit. The sheriff made his return accordingly, and gave an order to the custodian under him to cease his duties as such. One of the plaintiffs thereupon demanded possession of the defendant, who refused to comply with the demand. The defendant being in possession *pro hac vice* as keeper under the sheriff, it was clearly out of his power to acquire a possession adverse to the plaintiffs' rights.

Title does not come into view when the question is purely one involving the right of possession.

A PPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J.* Jury trial. *A. B. George*, for plaintiffs and appellees. *Watkins & Fort*, for defendant and appellant.

LUDELING, C. J. This is a possessory action. The plaintiffs, it appears, obtained possession of the quarter section of land which they sue to recover possession of by purchase of the same with the improvements upon it from one Robert Stothard in the month of January, 1872. Stothard, it is shown, was in possession of the place more than twelve months before he transferred it to the plaintiffs. Joseph Stothard was employed to hold possession for plaintiffs, who had corn, fodder, etc., on the place. During the month (January, 1872.) the place and improvements were attached at the suit of Laura Stevens against Robert

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Stothard, and taken possession of by the sheriff, who at first appointed Kelly keeper and afterwards Laura Stevens herself, who employed Abercrombie, the defendant, to take charge of the place as her agent. On the twenty-ninth of January, 1872, the seizure was released by order of Mrs. Stevens, the plaintiff in the attachment suit. The sheriff made his return accordingly, and gave an order to the custodian under him to cease his duties as such. One of the plaintiffs thereupon demanded possession of the defendant, who refused to comply with the demand. In this manner the controversy was brought about. The case was tried before a jury, who rendered a verdict in favor of the plaintiff, giving him possession of the premises and awarding him ninety dollars for rents. The defendant has appealed.

It was clearly out of the power of the defendant thus to acquire a possession adverse to the plaintiffs' rights that would avail him, as his act was in fraud of their rights. He was in possession *pro hac vice* as keeper under the sheriff in lieu of Mrs. Stevens, by whose orders the seizure by the sheriff was released. The defendant contends that he holds possession of the land as public or railroad lands for the purpose of pre-empting upon it, and he offered to show by a certificate from the land office that the land is railroad land. The evidence was properly rejected. Title in this case does not come into view, the question being purely one involving only the right of possession. 7 La. R. 6; *ibidem* 414; 9 La. 152; 5 L. 117, and numerous other authorities.

Judgment affirmed.

No. 441.

CORNELIA MCCOY AND HUSBAND v. NEELY MCCOY, Administrator.

When the amount allowed to a widow in necessitous circumstances is claimed, it must be clearly established that these circumstances existed at the time the suit was filed.

APPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J. A. B. George, L. B. Watkins*, for plaintiff and appellee. *Watkins & Fort*, for defendant and appellant.

MORGAN, J. Plaintiff, widow of L. F. McCoy, and now the wife of Alexander D. Hamilton, sues the administrator of the succession of her former husband, and, alleging that at the death of her said husband she was in necessitous circumstances, claims one thousand dollars.

She further alleges that the estate left by her former husband was community property, and that as he died without leaving ascendants or descendants, she is entitled, as surviving widow, to the possession of all the property left by him during her natural life.

We do not think that these demands are inconsistent, as they are alleged to be by the defendant. If she was in necessitous circumstances,

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she would be entitled to the amount allowed her by law. If she was in community with her husband she would be entitled to her share of the community. Only the value of her interest therein would have to be deducted from the amount necessary to make up the \$1000. Thus, if the succession of her husband consisted of property, acquired during marriage, and valued at \$1500, she would be entitled to \$750, in her own right, and the balance of the amount necessary to make up the \$1000, viz., \$250 would be taken from the estate. She would clearly not be entitled to, first, the \$750, amount of her interest in the community, and second, \$1000 on account of her necessitous circumstances. She could only get an amount out of the succession of her husband, which, added to her own, would make up the sum of \$1000.

As the sum claimed exceeds five hundred dollars, perhaps the district court had jurisdiction.

We understand the law which she invokes to be a charity, to be entitled to which it is necessary that the party claiming it should be an object of charity, or, as the law itself has it, in necessitous circumstances, and that these necessitous circumstances should exist at the time the charity is applied for. This is a question of fact, the affirmative of which is held by the applicant, and which must be established by the party claiming it. If the necessitous circumstances, admitting that they once existed, came to an end, the reason of the law would come to an end; when the reason ceases the law ceases with it. It would hardly be contended that, if a wife was left in destitute circumstances at the death of her husband, and while his succession was under administration she inherited a fortune, she would nevertheless be entitled to receive from his estate \$1000. The injustice of such a doctrine would be manifest. The property left by the husband might not be worth more than \$1000, and he might owe to persons in circumstances as necessitous as those of his wife, more than that sum. To give her the whole of his estate, and to his creditors nothing, when they needed it and she did not, would be cruel as well as unjust.

Now, in the case under consideration, it is not even alleged that the plaintiff is, or was when the suit was filed, in necessitous circumstances. It is established that when her husband, McCoy, died she had nothing, but she has married since, and what her circumstances now are, we are not informed. For aught we know, she may be comfortably off.

Without expressing any opinion as to her right to recover, after her second marriage, the amount allowed to widows in necessitous circumstances, we are clearly of the opinion that she should make the circumstances which give her the right she claims clear. As she has not done this, we think she should suffer nonsuit.

Judgment affirmed.

Scott v. Davis et al.

No. 467.

J. H. SCOTT v. D. C. DAVIS et al. F. B. DAVIS, Garnishee.

When there is no garnishment the actual seizure of the property is alone the basis of the attachment and jurisdiction of the court. It is the duty of the sheriff to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper.

APPEAL from the Eleventh Judicial District Court, parish of Bienville. *Trimble, J. J. F. Pierson*, for plaintiff and appellant. *L. B. Watkins*, for defendants and appellees.

TALIAFERRO, J. This suit is brought by attachment against D. C. Davis, of whom the plaintiff complains that, after having made a simulated sale of his property for the purpose of defrauding his creditors, left the State permanently. The plaintiff attacks the sale he complains of and prays that it be decreed simulated, null and void, and the land it purports to convey be made subject to the plaintiff's demand. An attachment was issued and put into the hands of the sheriff, who made a return of having seized and attached certain land, giving a description of the same. A curator *ad hoc* was appointed to represent the absentee. Personal service was made on the other defendants. An exception was filed by the defendants to the legality of the proceedings on these grounds :

First—No legal service of citation on the absentee.

Second—That the plaintiff has cumulated a number of small claims, belonging to other persons, to make up a fictitious sum to give jurisdiction to the court—his own demand being less than the amount required to give jurisdiction.

Third—No actual seizure of property was ever made. The property pretended to have been seized was never in the possession of the sheriff, or of any other person possessing for him.

The exception was sustained and the suit dismissed. The plaintiff appealed. It is clear there was no actual seizure made. The return of the sheriff is that the service of the writ of attachment was made "by seizing and attaching the following described property, to wit: South half of section nine and south quarter of northwest quarter of section nine, and southeast quarter of section eight, township sixteen, range nine west, seized as the property of D. C. Davis, this December 15, 1873." The sheriff being placed upon the stand as a witness said, in relation to service of the attachment: "I went on the place where Mr. D. C. Davis did live, and on the land described as having been seized. I handed F. B. Davis, Jr., a copy of petition, a copy of attachment and of citation; told F. B. Davis, Jr., that I had seized and attached that land. I asked him if he expected to remain on the place and make a crop, and he (Davis) stated that he did. I then told him

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that I would not dispossess him, as it was land and could not be removed, to which he made no objection. He urged no rights of his own as opposed to the seizure of said land—made no objection to the seizure; and I told him he could remain there until the matter was decided by the courts, to which proposition he (Davis) said, ‘yes sir.’”

“When there is no garnishment the actual seizure of the property is alone the basis of the attachment and the jurisdiction of the court.” 6 An. 551; Ib. 581. “It is the duty of the sheriff to take the property into actual possession; if it be to a plantation it remains sequestered in his custody until the sale, and he may appoint a keeper.” C. P., articles 656, 662, 762; 6 Rob. 100.

The decree of the lower court was properly rendered.

Judgment affirmed.

No. 512.

B. M. JOHNSON v. F. A. FLANAGAN et al.

Where A, in order to raise money to pay his creditor B, authorized B to draw on him a draft which was accepted and negotiated, but not paid when due;

Held—That B had a right to expect his draft to be honored and is discharged from all liability on the draft by the laches of the holder in not giving him notice of non-payment.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Land & Taylor*, for plaintiff and appellee. *Nutt & Leonard*, for defendant and appellant.

LUDELING, C. J. The plaintiff sued Flanagan as acceptor and J. C. Moncure as drawer of a draft for \$1000. The defense is want of notice of dishonor. The facts appear to be as follows:

F. A. Flanagan and J. C. Moncure were law partners; Flanagan owed Moncure \$800 or \$900, and being without the money to pay Flanagan was willing to accept a draft, drawn by Moncure for \$1000, in favor of Moncure & Flanagan, if it could be discounted at the bank of the plaintiff. Moncure spoke to the plaintiff, on the subject, who consented to discount the draft. The draft was drawn, indorsed by Moncure & Flanagan, the drawees, accepted by Flanagan and discounted by Johnson, and the money was received by Flanagan from Johnson, and \$800 or \$900 of the proceeds were given by him to Moncure.

The question is, was Moncure, the drawer, entitled to notice of non-payment, under the circumstances? We think he was. It was an ordinary commercial transaction by which a debtor was enabled to raise money to pay his creditor, who conditionally bound himself, to enable his debtor to get the money. Flanagan, the debtor, had authorized him to draw on him, promising to accept and pay the draft.

Margaret S. Pool v. Annie Alexander and Husband.

The draft was accepted but not paid. Moncure had a right to expect his draft to be honored, and he is discharged from all liability on the draft by the laches of the holder in not giving him notice of non-payment.

It is therefore ordered and adjudged that the judgment of the lower court, against Moncure, be avoided and annulled, and that there be judgment in his favor and against the plaintiff, rejecting his demand with costs.

Rehearing refused.

No. 514.

W. W. HARPER v. H. LINMAN. NEITH LODGE, Third Opponent.

As a general rule the sale of property by the probate court transfers the mortgage from the thing sold to the proceeds in the hands of the administrator, but this applies only to the sale of the property of the deceased. In the case at bar, at least one-half of the mortgaged property belonged to the defendant, the surviving husband, and the value of this half exceeds the amount of the mortgage of the third opponent. The sale of defendant's property by the probate court certainly did not raise the mortgage of the third opponent thereon.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. Land & Taylor*, for plaintiff and appellee. *Egan & Wise*, for third opponent and appellant.

WYLY, J. This is a controversy between mortgage creditors for the proceeds of the sale of certain property belonging to the defendant. Cristine Linman, the wife of the defendant, died in 1871, and her husband was appointed administrator of her succession. The property in question, to wit: Two lots of ground in the city of Shreveport, with the improvements thereon, were inventoried as belonging to the community. The third opponent was a community creditor, having a special mortgage on said lots. After a tableau of debts had been homologated, showing that the community was insolvent, all of the community property, including the lots upon which the third opponent held a mortgage, was sold by order of the probate court, and Harper, the plaintiff, purchased it. He subsequently conveyed it to the defendant, Linman, the husband of the deceased and the surviving partner in community, retaining a special mortgage to secure the price. The defendant failed to pay the price and the plaintiff foreclosed his mortgage. Thereupon the third opponent, a conventional mortgage creditor, intervened and claimed of the proceeds a sufficient amount to satisfy the mortgage of said opponent.

The court dismissed the opposition and gave judgment in favor of plaintiff. The third opponent has appealed. As a general rule the sale of property by the probate court transfers the mortgage from the

Harper v. Linman.

thing sold to the proceeds in the hands of the administrator; but this applies only to the sale of the property of the deceased. In the case at bar at least one-half of the mortgaged property belonged to the defendant, the surviving husband; and the value of this half exceeds the amount of the mortgage of the third opponent. The sale of defendant's property by the probate court certainly did not raise the mortgage of the third opponent thereon. Whether the sale raised the mortgage on the other half, or whether it only amounted to an alienation of the residuary interest of the wife in the community, it is not necessary now to decide.

The evidence shows that prescription was interrupted.

It is therefore ordered that the judgment herein be annulled, and it is ordered that there be judgment in favor of the third opponent, the Neith Lodge, No. 21 I. O. O. F., requiring the sheriff to pay the demand thereof out of the proceeds of the sale of the property mortgaged to said opponent. It is further ordered that the plaintiff pay costs of this proceeding in both courts.

Rehearing refused.

No. 477.

DODSON HARRELL v. JOHN G. SANDERS.

A certain quantity of cotton sequestered at the suit of plaintiff, who claimed \$772 55 from Grant, his employer, was released upon a bond on which defendant went surety, and a judgment was rendered against Grant in favor of plaintiff, by consent, for \$532, with privilege. After the issuing of a *feri facias* and the return of *nulla bona*, the defendant being sued to make him responsible as surety on the bond;

Held—That the admission of Grant that he owed a certain sum—less than the sum claimed—for which amount judgment was rendered, did not release the surety on the bond from paying the judgment which he had agreed to pay, should judgment be rendered against the principal on the bond. The defendant was not surety for any *debt* due by Grant to plaintiff, but had merely bound himself to satisfy any judgment which might be given.

The objection that a privilege can not be given by consent is not to be taken into consideration, because the plaintiff's right to recover does not rest upon the privilege which was granted to him by the judgment, but on the judgment itself.

The defense that defendant is not responsible on the bond, which, it is alleged, has none of the features of a legal bond for the delivery of property sequestered, is not valid. The bond must be considered with reference to the law under which it was given. No matter what the parties choose to call it, the law designates it as a forthcoming bond, and as such it must be regarded.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. R. W. & R. Richardson*, for plaintiff and appellee. *Cobb & Gunby*, for defendant and appellant.

MORGAN, J. Harrell sued Grant for services rendered him as an overseer. He sequestered certain cotton grown upon the land which had been under his supervision. The sequestration was set aside and

the property released upon bond. Sanders was the surety on the bond.

The amount claimed by Harrell was \$772 55. Judgment was rendered in his favor, by consent, for \$532 with privilege. *Fieri facias* issued thereon and was returned *nulla bona*. The object of this action is to make Sanders, the surety on the bond, responsible for the judgment. The first defense urged is that the judgment against Grant was the result of a transaction or compromise to which Sanders was not a party, and that he is thereby discharged from liability.

"The surety is discharged when by the act of the creditor the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety." C. C. 3061.

"The prolongation of the terms granted to the principal debtor without the consent of the surety, operates a discharge of the latter." C. C. 3032.

"The creditor who transacts with the surety of his debtor, may discharge the surety only, and the transaction will not diminish his right against the debtor. But if it is with the debtor himself that he has transacted the surety will likewise have the benefit of the transaction, because his obligation is only an accessory to that of the principal debtor." C. C. 3076.

"A transaction made by one of the interested parties is not binding for the others, and can not be opposed by them." C. C. 3077.

These are the articles of the Civil Code upon which the defendant relies for relief from his obligation.

But Sanders was not the surety for any debt due by Grant to Harrell. He merely bound himself to pay any judgment which might be rendered against him. There was no prolongation of any term of payment. There was no transaction between Harrell, the creditor, and Grant, the surety, on the bond; nor was there a transaction binding on those who made it, and not binding on others. Harrell had sued Grant. Grant admitted that he owed a certain amount, less than the sum claimed, and for this amount judgment was rendered. This does not release the surety on a bond from paying the judgment which he has agreed to pay should judgment be rendered against the principal on the bond. Neither do the decisions in the cases of *McGuire v. Barnett*, 6 R. 47, or *Peacock v. Chapman*, 8 An. 87, in our opinion, sustain the defendant in his position. Both cases were actions against parties originally bound for the debts sued for, and in both extension of time had been given to the principals.

His second objection is that a privilege can not be given by consent. If the plaintiff's right to recover rested upon the privilege which was granted to him by the judgment, this question would have to be con-

Harrell v. Sanders.

sidered. But his right does not depend upon his privilege. It is founded upon his judgment.

The next defense is that Sanders is not responsible on the bond, which, it is alleged, has none of the features of a legal bond for the delivery of property sequestered. The bond must be considered with reference to the law under which it was given. No matter what the parties chose to call it, the law designates it as a forthcoming bond, and as such we must regard it.

The last objection is that the value of the property released was not proven. We think it was. It is shown by the return of the sheriff, and this evidence is not contradicted.

Judgment affirmed.

No. 473.

JAMES CHRISTIAN v. H. F. VICKERS.

The plaintiff's answers on facts and articles being obtained by defendant, these answers must prevail over the unsupported testimony of the defendant.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Todd & Potts*, for plaintiff and appellee. *Wells & Williams*, for defendant and appellant.

LUDELING, C. J. This suit is predicated upon a note given for a part of the price of a tract of land.

The defense is that there is a partial failure of the consideration of the note, and that there was an agreement between the parties that "the notes should be credited with a sum of money bearing the proportion to the price defendant stipulated for the place that the number of acres claimed by Christian did to the whole tract, which respondent subsequently ascertained to be \$1500." He further pleaded compensation.

There was judgment for plaintiff and defendant has appealed. The defendant took three bills of exceptions during the trial. They all relate to the refusal of the judge to permit the defendant to testify in regard to the consideration of the note sued upon, and the new agreement alleged in the answer and the failure of consideration. It is unimportant to discuss the question whether the rulings were correct or not, inasmuch as if the testimony of the defendant were admitted, it could not change the decision. The plaintiff's answers on facts and articles were obtained by defendant. These answers must prevail over the unsupported testimony of the defendant.

On the merits, the evidence supports the judgment.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

Geren v. Gruber, Tax Collector.

No. 445.

THOMAS R. GEREN v. E. H. GRUBER, Tax Collector.

The assessment for revenue purposes consists in the descriptive lists and the valuation of property by the officers designated for that purpose, and if any discrepancy in the description of the property exist between the original lists and the copies furnished, the description in the original must control.

This court has no jurisdiction over the question of excessive taxation of property, after the delay given to taxpayers to correct their assessment has expired, if it ever has.

Inasmuch as the registry of the list of delinquent taxpayers was made before the recordation of the plaintiff's deed, he can not raise the question of registry, even if necessary to procure the right of preference in favor of the State.

Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic, and it is competent for the sovereign to provide how these contributions shall be collected and to say whether the right of preference shall exist for the payment of the same, and for what length of time.

The right of taxation is one of the attributes of sovereignty, and the fundamental law of the State provides that it shall be equal and uniform and *ad valorem*. It is the property of the State which is to be taxed, and it is immaterial to the State whether it belongs to A or to B. As long as the tax is unpaid, the State has a right to exact it.

It is also competent for the State to make each and every piece of property owned by any one, responsible for the whole amount of the taxes assessed to him—and such is in fact the law.

The right of redemption accorded *ex gratia* must be exercised under the conditions imposed.

The constitutional objection that the penalties are being collected without due process of law, and that they can only be collected by hypothecary action, has no force. As there is no debt and no mortgage to enforce, the hypothecary action could not be maintained. Due process of law is provided in the statute on the subject. The same statute declares that the property is burdened with the taxes and a lien and privilege to secure the payment of the taxes, and that it will remain burdened into whatever hands it may pass.

There is no force in the objection that the amount of the penalties is not mentioned in the recorded list against the delinquent taxpayer. The penalties, like legal interest, are fixed by law.

The recordation of a description of the property of a delinquent taxpayer is the *mode of seizure* provided for by the statute.

The law maker did not contemplate the advertisement of the property before the seizure. It declares that the tax collector, on the fourth day of such recordation, may proceed to sell without (other) legal process, after advertising, etc., etc. The four days must be regarded as the days of grace allowed the delinquent before advertising his property for sale—corresponding to the delay accompanying notices of seizures.

The plaintiff's purchase of certain lots from the original owner, as whose property they were assessed, could only have invested him with such rights as the original owner and delinquent taxpayer, and that was the right of redemption.

Not having offered to avail himself of the right of redemption under the conditions prescribed, the plaintiff had no interest or right to interfere by injunction with the proceeding of the tax collector.

The law authorizing one hundred per cent. damages for wrongfully injunctioning the collection of taxes, does not apply when one, other than the person to whom the taxes are assessed, sues out the injunction, and the original taxpayer can only do it prior to the forfeiture.

A PPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J. Watkins & Fort*, for plaintiff and appellant. *L. B. Watkins*, for defendant and appellant.

LUDELING, C. J. The plaintiff enjoined the sale of lots 120 and 121 in the town of Minden, seized and advertised for sale to pay the taxes due by E. E. Archinard, for the year 1871, on the grounds, that "the house and lots 120 and 121 are not the property of E. E. Archinard,

Geron v. Gruber, Tax Collector.

but the property of your petitioner; that there is no lien or mortgage for the State and parish taxes of E. E. Archinard on said lots, and no legal seizure of said lots has been made, and said lots are not liable for the taxes of E. E. Archinard." He further alleges that the principal amount of the taxes against E. E. Archinard was for stock in trade, which was erroneous, since his stock was sold in 1871 to Samuel Archinard, to whom the same was assessed," etc.

The facts disclosed by this record are that E. E. Archinard was doing a commercial business in Minden in 1871, where he resided; that the tax collector left with him a blank descriptive list, to be filled by him with a correct description of his taxable property, for assessment; that this list was returned to the tax collector filled up, under oath, and signed E. E. Archinard, per G. W. Rawls, who was his clerk and agent; that this was subsequently ratified by E. E. Archinard in repeated conversations with the tax collector, in which Archinard complained of the high taxes on the capital in trade, inasmuch as he had only been in business a few months. That this descriptive list of the property described lots 120 and 121, in the town of Minden, with a house thereon; that this property was assessed or appraised by the board of assessors and filed in the recorder's office in 1871, and that the taxes of E. E. Archinard are due and unpaid.

By an act under private signature, dated twenty-eighth of August, 1872, lots 120 and 121 were sold to the plaintiff. This act was duly proved and recorded on the nineteenth day of July, 1873. On the ninth day of December, 1872, the delinquent list for the parish of Webster was recorded in the mortgage book. In this list the lots are described as numbered twenty and twenty-one, and so they are in the copy of the assessment roll filed in the recorder's office. After advertising the sale of the property the tax collector discovered the error in the description, and he attempted to correct it by having recorded in the mortgage book a corrected list of the property of the delinquent taxpayer, by making it correspond with the original descriptive list furnished by E. E. Archinard.

The first and principal questions are, was there an assessment, and what constituted that assessment? Section 23 of the revenue act of 1871 provides, "that each assessor appointed for the city of New Orleans, and the tax collectors appointed for each of the parishes, shall proceed, by diligent inquiry, between the first day of February and the first day of July of every year, to ascertain the names of all the inhabitants of their respective parishes, who are taxable for licenses or for property, or for both, and also to obtain a description of all the taxable property within the same. And to these ends and purposes said assessors and tax collectors shall, without delay, serve on each of

the taxpayers of their respective parishes or districts a written or printed notice, containing an enumeration of all the objects of taxation, both real and personal, as fixed by law, and requiring each taxpayer so notified to fill up the blanks in said notice with such of the objects of taxation aforesaid as he possesses or has under his control, and to give the value of each of said objects of taxation, and to make a declaration over his signature to the correctness of the statements so made, declared and signed. And said statement so filled up, etc., shall be returned to said assessor or tax collector, as the case may be, on or before the first day of July, following service of said notice."

Section 24 provides that "the whole of said lists shall be carefully stitched or bound together, and shall be deposited with the descriptive or assessment rolls, as hereinafter provided for, in the offices of the parish recorders—those for the city of New Orleans in the office of the board of assessors," etc.

Section 39 provides that the tax collectors shall "complete their descriptions of all the taxable property of their respective assessment districts or parishes, on or before the first of August of each year, and shall affix to it an affidavit made by them;" and said assessors and tax collectors "shall deposit said rolls with the board of assessors for the city of New Orleans, or with the parish recorders, as the case may be; and the respective officers, with whom the rolls shall be lodged, shall indorse upon them the time when they were received."

Section 40 provides that "the property in the descriptive rolls of the tax collectors shall be assessed by the clerk of the district court, the recorder and sheriff," etc. "For this purpose they shall give notice in the official journal of the parish to all taxpayers * * * that they will assess the property of the parish for one month, commencing from first day of August and ending first day of September."

Section 42 provides that "after the assessment is completed, the tax collectors shall make three fair and correct copies of the assessment rolls of their several parishes, which shall be approved and signed by said board of assessment. One of these copies they shall immediately forward to the Auditor of Public Accounts; one they shall deposit, together with the descriptive rolls, in the office of the recorder, and the third they shall deliver to the tax collector upon the order of the Auditor of Public Accounts."

We conclude that the assessment consists in the descriptive lists and the valuation of the property by the officers aforesaid, and that if any discrepancy in the description of the property in the original lists and the copies exist, the description in the original must control.

The evidence shows that the original descriptive roll was made, and that the officers whose duty it was to make the appraisement of the

property did so on said original rolls. This court has no jurisdiction over the question of excessive valuation of the property, after the delay given to taxpayers to correct their assessments has expired, if it ever has.

Inasmuch as the registry of the list of delinquent taxpayers was made before the recordation of the plaintiff's deed, he can not raise the question of registry, even if registry be necessary to preserve the right of preference in favor of the State, about which we express no opinion here.

Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic, and it is competent for the sovereign to provide how these contributions shall be collected, and to say whether this right of preference shall exist, and for what length of time. The right of taxation is one of the attributes of sovereignty, and the fundamental law of the State provides that it shall be equal and uniform and *ad valorem*. It is the property of the State which is to be taxed, and it is immaterial to the State whether it belongs to A or to B. So long as the tax is unpaid the State has a right to exact it, and in justice to the other property holders the State is bound to exact it.

It is also competent for the State to make each and every piece of property owned by any one, responsible for the whole amount of the taxes assessed to him. And such in fact is the law. Nor is there any inconsistency in saying that it is the property which is taxed, and that each piece of property in the possession of the taxpayer is responsible for the whole amount of taxes with which he is assessed. The State has the power to make such laws as in its discretion will secure and enforce the prompt collection of taxes. And we fail to see wherein this provision of the law violates the constitution.

The right of redemption, accorded *ex gratia*, must be exercised under the conditions imposed. Nor do we perceive the force of the constitutional objection that the penalties are being collected without due process of law, and that they can only be collected by the hypothecary action. As there is no debt and no mortgage to enforce, the hypothecary action could not be maintained. Due process of law is provided in the statute. The same statute declares that the property is burdened with the taxes and a lien and privilege to secure the payment of the taxes, and that it will remain so burdened into whatsoever hands it may pass. The plaintiff is presumed to know the law, and he can not defeat the summary process for the collection of taxes by buying the property subject to the taxes. As well might a third person in possession of property subject to a mortgage with the pact *de non alienando*, say that our executory process is unconstitutional. Nor is there

any force in the objection that the amount of the penalties is not mentioned in the recorded list against the delinquent taxpayer. The penalties, like legal interest, are fixed by the law.

The recordation of a description of the property of a delinquent taxpayer is the mode of seizure provided by the statute. Section 57, act 42 of 1871, p. 120. But the law maker did not contemplate the advertisement of the property before the seizure. It declares that the tax collector, "on the fourth day of such recordation, may proceed to sell without (other) legal process, after advertising three times within twenty days in the official journal." The act of 1873 only changes the length of time for advertising. The four days must be regarded as the days of grace allowed the delinquent before advertising his property for sale, corresponding to the delay accompanying notices of seizures.

The complaint that there has been no seizure comes with a bad grace from the plaintiff, as, if true, he would have no just cause to complain. Nor is he less inconsistent when urging, as an argument against the sale of lots 120 and 121, that they were forfeited to the State by the default of the taxpayer to pay his taxes. His purchase of these lots from the original owner, as whose property they were assessed, could only have invested him with such rights as he (the original owner and delinquent taxpayer) had, and that was only the right of redemption.

We have already said, this right can only be exercised under the conditions imposed by the law, to wit: by paying the taxes for which the property is liable, with the penalties and costs. Not having offered to do this, the plaintiff had no interest or right to interfere with the proceedings of the tax collector.

The law authorizing one hundred per cent. damages for wrongfully enjoining the collection of taxes, does not apply, when one other than the person to whom the taxes are assessed, sues out the injunction, and the original taxpayer can only do it, prior to the forfeiture.

It is therefore ordered and adjudged that the judgment of the lower court be avoided, and that there be judgment against the plaintiff and in favor of the defendant dissolving the injunction, with costs in both courts.

Morrison v. Larkin, Tax Collector.

No. —.

C. H. MORRISON v. P. J. LARKIN, Tax Collector.

26	699
46	154
26	699
51	425
26	699
152	1843
26	699
111	793
111	795

The plaintiff has enjoined defendant, tax collector, from selling certain lands seized for non payment of taxes. He contends that the collector's authority does not extend to the sale of lands forfeited to the State as his were, under sections 66, 67 and 68 of article No. 42 of the acts of 1871. The plaintiff can not assume this position without putting himself out of court, because, if his lands were forfeited to the State in pursuance of said act, the only right remaining to him is the right of redemption, under section 69 of said act, and until he chooses to exercise this right, he has no more interest in said lands than any other individual.

Besides, if the defendant has no authority to sell the lands forfeited to the State, no title will pass to the purchaser; there will be no change of ownership and the plaintiff can not be injured. But, on examination of the statutes, it is found that the tax collectors have authority to collect taxes on the delinquent lists, and for this purpose can sell the land forfeited to the State.

The implied contract of every citizen with the State, is to bear his share of the common burden of taxation for the support of government. If he should fail to meet this obligation, there is no reason why he should not pay damages for breach thereof.

The law authorizing the forfeiture of the lands to the State after due notice has been given to the owner, and reserving to him the right of redemption on paying certain damages and costs, is regarded as a legitimate means employed by the State to collect her resources.

Nothing is found in the law authorizing the forfeiture of the lands to the State for non-payment of taxes after due notice, repugnant to the articles of the State constitution relied on by plaintiff, nor is it in contravention of article one of the fourteenth amendment of the Constitution of the United States.

It is true that the special grant of authority in article 118 of the constitution, to the general assembly, "to exempt from taxation property actually used for churches, school or charitable purposes," carries with it implied inhibition against the exemption of property not actually used for church, school or charitable purposes. But, while those sections of the law and the special acts exempting property from taxation in contravention of the constitution, may be void, the other provisions of the law authorizing the levying and collecting of the taxes are valid and may be enforced.

If the exemptions complained of contravene the constitution, they are void, and such property under section 55 of act 42 of the acts of 1871, is liable to be assessed and taxed like all other property. There is then no inequality of which the plaintiff can complain.

Section 8 of act 47 of the acts of 1873, prohibiting a delinquent tax payer from bringing a suit or being a witness, is violative of article 114 of the constitution and void, the object of said section not being expressed in the letter of the law.

In regard to the one hundred per cent. damages for suing (section 3 of article 47 of acts of 1873), that provision does not apply to a case like this, when lands have been forfeited to the State.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. W. W. Farmer*, for plaintiff and appellee. *C. T. Dunn*, for defendant and appellant.

WYLY, J. The plaintiff enjoined the defendant, the tax collector, from selling under act 47 of the acts of 1873, certain lands in the parish of Morehouse, which he alleges belong to him, for the State and parish taxes for the years 1870, 1871 and 1872, and also for the penalties prescribed by law for non payment of the taxes of 1870 and 1871.

The court finding that the taxes for 1870 had been paid, maintained the injunction to that extent. It also maintained the injunction in regard to the penalties, but dissolved it for the taxes of 1871 and 1872, ordering the sale to be made for said amounts and condemning the defendant to pay costs. From this judgment the defendant appeals.

Morrison v. Larkin, Tax Collector.

The plaintiff also joining in the appeal prays for an amendment of the judgment so as to perpetuate the injunction for all the taxes, penalties and costs.

The judge did not err in holding that the taxes for 1870 had been paid, the fact being fully established by the record.

The right of the defendant to sell the property of taxpayers for taxes under act 47 of the acts of 1873, is not disputed. But the plaintiff contends that his authority does not extend to the sale of lands forfeited to the State, as his was, under sections 66, 67 and 68 of act No. 42 of the acts of 1871. The plaintiff can not assume this position without putting himself out of court, because, if his lands were forfeited to the State in pursuance of said act, the only right remaining to him is the right of redemption under section 69 of said act, and until he chooses to exercise this right he has no more interest in said lands than any other individual. Disavowing title and setting up ownership of the State as a ground to resist the sale proposed by the tax collector, the plaintiff stands before the court without cause of complaint; he has no pecuniary interest and can not be relieved. Besides, if the defendant has no authority to sell the lands forfeited to the State, no title will pass to the purchaser, there will be no change of ownership, and the plaintiff can not be injured. But upon examining the statutes, we find that the tax collectors have authority to collect taxes on the delinquent lists and for this purpose can sell the lands that have been forfeited to the State. Sections 38, 55, 57, 59, 60, 65, 69 of act 42 of the acts of 1871, and sections 5 and 9 of act 47 of the acts of 1873.

We find that the lands in controversy were forfeited to the State under sections 66, 67 and 68 of act 42 of the acts of 1871.

Section 68 provides: "That the said delinquent lists, or copies and verifications, when so filed in the office of the Auditor of Public Accounts, shall be entered by him on a record kept for that purpose, and shall vest, from the day of filing, a title to the lands and lots therein returned, in the State of Louisiana, which shall be impeachable only on proof that taxes for non payment whereof the lands were returned forfeited, had been in fact paid to the collector before the return of the lists to the recorder."

Section 69 declares, "That if any person interested in any lot or lands forfeited to the State shall, after the date of the collector's return, pay to the treasurer of the State or to the tax collector charged with the collection of the tax for which said property was forfeited, the taxes for which the same was returned, and all taxes subsequently accrued on such land, and twenty-five per cent. damages thereon, and twenty-five per centum additional, for every year or part of year, after one year, the Auditor upon proof thereof, shall execute and deliver to such person a certificate of redemption" etc. * * *

Section 6 of act 47 of the acts of 1873, provides: "That all real estate sold hereafter under the provisions of this act, or any other law of this State providing for the sale of property of delinquent tax-payers, shall be redeemable by the owners thereof or their legally authorized agents within six months from date of sale, upon payment to the party purchasing at the tax collectors sale of the amount of the purchase money with fifty per centum additional and all costs." * * *

Under the express provisions of law the title of the lands in controversy vested in the State from the time the delinquent lists were filed with the Auditor, and this title is impeachable only on proof that the taxes for which they were forfeited, had in fact been paid to the collector before the return of the lists to the recorder. The only interest, therefore, that the plaintiff has, and the only right he can exercise in regard to these lands, is the right of redemption given by section 69 of act 42 of acts of 1871. While refusing or neglecting to exercise this right he cannot restrain the sale of the lands by the tax collector. If the tax collector or auditor refuses to let him redeem the lands in conformity with section 69, because they require him to pay the taxes of 1870, which he has already paid, the plaintiff's remedy is a *mandamus*.

He may also redeem the lands after the sale on complying with section 6 of act 47 of the acts of 1873.

The plaintiff, however, contends that the law authorizing the forfeiture of lands to the State for non-payment of taxes, and imposing the damages to be paid before it can be redeemed, is void, because, repugnant to articles 2, 6, 8, 73, 93, 102, 110, 118 of the constitution of the State and also section 1, article 14, amendments to the constitution of the United States.

That the State has the power to levy and collect taxes can not be doubted; and that she can impose damages for non-payment of the taxes after due notice, is equally certain. The implied contract of every citizen of the State, is to bear his share of the common burden of taxation to support the government. If he should fail to meet this obligation there is no reason why he should not pay damages for breach thereof.

Having power to collect taxes, the State has authority to use whatever means that are necessary to accomplish the object. The law authorizing the forfeiture of the land to the State after due notice has been given to the owner, and reserving to him the right of redemption on paying certain damages and costs, we regard as a legitimate means employed by the State to collect her revenues. If there were no damages and no forfeiture, how could the State collect taxes, if from combination among bidders or otherwise, no one would bid for property

Morrison v. Larkin, Tax Collector.

when offered for sale? Without the fear of penalties and forfeiture of his land to the State, an obstinate taxpayer might successfully withhold from the State her legitimate revenues. We find nothing in the law authorizing the forfeiture of the lands to the State for non-payment of the taxes after due notice, repugnant to the articles of the State constitution relied on by the plaintiff. Nor is it in contravention of article one of the fourteenth amendment of the Constitution of the United States.

The lands of the plaintiff having been lawfully forfeited to the State, the tax collector under the revenue acts of 1871 and 1873 had authority to sell it for the amount of taxes and penalties due thereon, reserving to him the right of redemption contained in said acts.

The plaintiff contends that the revenue act of 1871 and the other statutes authorizing the taxes for which his lands were forfeited to the State, are void, because, in contravention of article 118 of the constitution, they exempt other property besides property actually used for church, school or charitable purposes. We agree with the plaintiff that the special grant of authority in article 118, to the General Assembly "to exempt from taxation property actually used for church, school or charitable purposes," carries with it an implied inhibition against the exemption of property not actually used for church, school or charitable purposes.

But while those sections of the law and the special acts exempting property from taxation in contravention of the constitution, may be void, the other provisions of the law authorizing the levying and collecting of the taxes are valid and may be enforced.

If the exemptions complained of contravene the constitution, they are void and such property under section 55 of act 42 of the acts of 1871, is liable to be assessed and taxed like all other property. There is then no inequality of which the plaintiff can complain.

In regard to the exception to the capacity of plaintiff to sue, we will remark that section 8 of act 47 of the acts of 1873, prohibiting a delinquent taxpayer from bringing a suit or being a witness, is violative of article 114 of the constitution and void, the object of said section not being expressed in the title of the law.

In regard to the one hundred per cent. damages for suing (section 2 of act 47 of acts of 1873), we will observe that that provision does not apply to a case like this where lands have been forfeited to the State.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the injunction herein be dissolved, plaintiff paying costs of both courts.

Rehearing refused.

Carried by writ of error to the Supreme Court of the United States.—REPORTER.

 Mary Markham v. Schardt.

No. 462.

MARY MARKHAM v. JACOB J. SCHARDT.

This is a suit to annul the judgment homologating the proceedings of a family meeting recommending, and the order appointing, defendant as the tutor of certain minors.

It was not incumbent on said defendant, in order to be appointed, to allege or show that there were no relatives of the minors in the State entitled to the tutorship.

It is the duty of the relatives residing within the parish of the judge who is to make the appointment, to apply to such judge within a given time, to have a tutor appointed when necessary. The plaintiff in this case, who alleges to be the grand mother of the minors, resides in the distant parish of Caddo, and there is no relative in the parish of the minors.

Any one may give information to the judge of the necessity for the appointment of a tutor, but it is not necessary for such person to show who are entitled to the tutorship. If there be such in the parish, they can apply for the appointment, or make opposition to any application.

The fact that the family meeting were not unanimous in recommending the defendant, may have been a ground for opposing the homologation of the proceedings, or for the convoking by the judge of another meeting, but it is not a ground for annulling the judgment of homologation or appointment.

The appointment of a tutor without bond is authorized upon the advice of a family meeting, when no one will take the tutorship and comply with the law requiring a bond. It is shown in this instance that the minors owned no property and that the defendant had charge of them for about seven years before any of their relatives claimed the tutorship.

The grand mother of the minors could, by timely proceeding, have procured the appointment to their tutorship in preference to the defendant, but the latter having been duly appointed, she can not urge such right as a ground for his removal or the annulment of his appointment.

A PPEAL from the Parish Court, parish of Morehouse. *Wheeler, J. S. G. Parsons*, for plaintiff and appellee. *Newton & Hall*, for defendant and appellant.

HOWELL, J. Plaintiff, the grand mother of the minors Hannah and Lizzie Baird, sues to annul the judgment homologating the proceedings of a family meeting recommending the order appointing defendant as the tutor of said minors, on the grounds :

First—Because the defendant neither alleged nor proved that there were no relatives of said minors entitled by law to the tutorship.

Second—Because the proceeding of the family meeting were not unanimous, and were therefore illegally homologated.

Third—Because the defendant has not given bond, nor alleged that no one else is willing to accept the tutorship.

Fourth—The father, mother, and grand father of said minors are dead, and plaintiff, their grand mother, is the only relative living entitled by law to the tutorship, which she is willing to accept.

The answer sets up the appointment of defendant upon the recommendation of a family meeting, the proceedings of which were duly homologated, and the issuance to him of letters of tutorship, and contains matters of special defense, and a demand for a bond to be given by plaintiff, if appointed, in favor of defendant for expenses incurred in behalf of the minors.

Mary Markham v. Schardt.

From a judgment in favor of plaintiff, with the condition of giving the bond demanded, the defendant has appealed.

I. It was not incumbent on the defendant to allege or show that there were no relatives of the minors in the State entitled to the tutorship. Article 308, R. C. C., declares it the duty of the relatives, residing within the parish of the judge who is to make the appointment, to apply to such judge, within a given time, to have a tutor appointed when necessary. The plaintiff in this case resides in the distant parish of Caddo, and there is no relative in the parish of the minors.

By article 312, any one may give the information to the judge of the necessity for the appointment of a tutor, but it is not necessary for such person to show who are entitled to the tutorship. If there be such in the parish they can apply for the appointment or make opposition to any application. See also C. P. article 957.

II. The fact that the family meeting were not unanimous in recommending the defendant, may have been a ground for opposing the homologation of the proceedings or the convoking by the judge of another meeting, but it is not a ground for annulling the judgment of homologation or appointment. There is no provision of law making such event a cause of nullity.

III. Article 271, R. C. C. authorizes the appointment of a tutor without bond, upon the advice of a family meeting, when no one will take the tutorship and comply with the law requiring a bond; and it is shown that the defendant had charge of the minors for about seven years before any of their relatives made themselves known, and that only by the application of this plaintiff for the tutorship. The family meeting in this case recommended that the defendant be dispensed from giving bond, as it was shown that the minors owned no property. C. P. 957.

IV. The grandmother, by timely proceeding, could have procured the appointment in preference to the defendant, but the latter having been duly appointed, she can not urge such right as a ground for his removal or the annulment of his appointment.

We think it unnecessary to discuss the questions raised in regard to previous condition and marriage of the parents and grand parents of the minors.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, dismissing plaintiff's demand with costs, in both courts.

Rehearing refused.

Mrs. E. V. Elbert and Husband v. Wallace & Co.

No. 474.

MRS. E. V. ELBERT and HUSBAND v. WALLACE & Co. and J. A. LIDDELL, Sheriff.

The objection to the introduction of plaintiff's testimony as a witness to prove in her own behalf that she was not a member of a certain firm, was properly sustained. If not estopped by her own declarations in an authentic act and in judicial proceedings, plaintiff's testimony could not have availed to show that she was not a member of said firm against her own solemn declarations in those instruments that she was.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Todd & Potts*, for plaintiff and appellant. *R. W. & R. Richardson*, for defendants and appellees.

TALIAFERRO, J. Wallace & Co., being owners of a promissory note executed in their favor by Hanna & Co. for \$2016 14, with interest at eight per cent. per annum from May 24, 1871, secured by mortgage executed on the twelfth of June following by R. P. Edwards, who also indorsed the note, took out an order of seizure and sale and caused the mortgaged property, viz., four town lots in the town of Girard, numbered respectively eleven, twelve, thirteen and fourteen, to be seized and advertised for sale by the sheriff. Mrs. E. V. Elbert, wife of Josiah H. Nettles, joined, and authorized by her husband, sued out an injunction to restrain the sheriff from proceeding to make the sale. The grounds stated for injoining are these :

First—That the plaintiff in injunction is in no manner bound for the debts of Zac. Hanna & Co., and was never a member of said firm.

Second—That she is the owner of lots numbered eleven, twelve and thirteen, seized in this case by the sheriff.

Third—That Edwards, the mortgageor, at no time had an interest exceeding one-half in the mortgaged property, and therefore if he ever mortgaged the property he could only have subjected to the mortgage one-half thereof.

Fourth—That Edwards was not a member of the firm or partnership of Zac. Hanna & Co., nor was he bound for the debts of that partnership. Neither did he assume to pay the debt of Zac. Hanna & Co. to Wallace & Co, nor to make himself personally liable for the same, and therefore that the pretended mortgage is an absolute nullity, as it is not accessory to any debt of the mortgageor.

Fifth—That the seizure was not preceded by an amicable demand of the alleged mortgageor according to law, or by notice to petitioner.

Wallace & Co. filed a motion to dissolve the injunction with \$250 damages as attorney's fees, twenty per cent. damages on the amount enjoined and eight per cent. interest on the amount of the note sued on from the time the injunction was filed in addition to the interest claimed in the petition until the same is released.

The grounds for dissolution of the injunction are :

First—The amount of the bond fixed by the parish judge is, upon the face of the papers, wholly insufficient to warrant the issuance of the injunction.

Second—The security on the bond is insolvent.

Third—That the authentic documents attached to the petition praying for the order of seizure and sale furnish further evidence of the falsity of every allegation in plaintiff's petition for injunction.

Judgment was rendered dissolving the injunction and commanding the sheriff to proceed with the sale of the property. It was further decreed that the plaintiff, Elizabeth V. Elbert, wife of J. H. Nettles, and her sureties, Abram Thompson and William T. Oliver, pay *in solido* to defendants in injunction ten per cent. on \$2260 19, the amount enjoined, viz., \$226 as general damages, and the further sum of \$175 as special damages and costs of suit. The plaintiff has appealed.

In the course of the trial, in the court below, the plaintiff was offered as a witness to prove in her own behalf that she was not a member of the firm of Z. Hanna & Co. This was objected to on the part of the defendants, who produced the authentic act of sale of the property of Z. Hanna & Co. to R. P. Edwards, and the records of various suits on the docket of the parish court, by which it was shown that that act of sale and those suits were brought by Z. Hanna and Mrs. Elizabeth V. Nettles, wife of Josiah H. Nettles, styling themselves "members comprising the commercial firm of Z. Hanna & Co." By these records it was contended the plaintiff was estopped from showing that she was not a member of that firm. The objection being sustained the counsel for plaintiff then offered to introduce the attorneys who had brought those suits, to prove by them that the plaintiff had not authorized them to style her a partner of the firm of Z. Hanna & Co. This also being objected to, and the objection sustained, the counsel for plaintiff, after defendants had closed their testimony, again offered to introduce the same attorneys as witnesses to establish, by way of rebuttal, the same facts they were at first introduced to establish. This meeting with no better success than in the former instance, the plaintiff reserved a bill of exceptions to the several rulings of the court in relation to the rejection of the evidence.

We think the exception was properly sustained. If not estopped by her declarations in an authentic act and in judicial proceedings, the plaintiff's own testimony could not have availed to show that she was not a member of the firm of Hanna & Co. against her own solemn declarations in these instruments that she was. 8 N. S. 134; 4 An. 416; 5 An. 18; 6 N. S.

Edwards was the owner of the lots eleven, twelve and thirteen and fourteen when he executed the mortgage. The note was indorsed by

Mrs. E. V. Elbert and Husband v. Wallace & Co.

him and identified with the act of mortgage. It is not contended that Edwards was a member of the firm of Hanna & Co., nor do we understand it to be the purpose of the defendants, although he indorsed the note, to render him liable for the debts of Hanna & Co. beyond the property mortgaged. "It is not necessary that the mortgage should be given by the person contracting the principal obligation; it may be given for the contract of a third person." C. C. 3295, 3297, 3298, et seq.; 1 An. 62

The proceedings in this case throughout, on the part of the defendants, to enforce the payment of their claim against their debtors, seem to have been regular and to have been taken with abundant caution. We think the case on their part fully made out, and see no reason to disturb the judgment of the lower court.

Judgment affirmed.

No. 465.

JULIA A. LEWIS v. WINSTON, MORRISON & Co., et als.

Where the wife alleged that she was separated in property from her husband, that the property seized and of which she was in possession at the time belonged to her, and prayed for an injunction to prevent the sale of said property to pay her husband's debts, the exception that plaintiff had failed to set forth the nature of her title can not be sustained. This is not a petitory action, although the title to property be incidentally involved.

The affidavit of the plaintiff in injunction, that the facts and allegations set forth are true, is sufficient. It was not necessary to state that they were all true. The importance of the omission of the word *all* in the affidavit can not be seen.

The objection that the husband has not authorized his wife to bring this suit was properly overruled. It is alleged in the petition that she is authorized by her husband, and this is not specially denied. But the injunction bond is signed by the husband. That is sufficient proof that he has authorized the institution of this suit.

A PPEAL from the Eleventh Judicial District Court, parish of Bienville. *Trimble, J. E. B. Watkins* and *D. F. Head*, for plaintiff and appellee. *J. F. Pierson*, for defendants and appellants.

LUDELING, C. J. Several creditors of O. F. Lewis having caused executions to be issued on judgments against him, caused certain property to be seized and advertised as his. Whereupon his wife, alleging that she was separated in property, and that the property seized belonged to her and was in her possession, obtained an injunction to prevent the sale of her property to pay her husband's debts. An exception was filed, stating that the plaintiff had failed to set forth the nature of her title, and praying for the dismissal of her injunction. The exception was properly overruled. This is not a petitory action, although the title to property be incidentally involved. Defendants then moved to dissolve the injunction on the ground that the affidavit is defective. They say: "The affidavit is that the facts and allega-

Julia A. Lewis v. Winston, Morrison & Co. et als.

tions in the petition are true, but does not state that they are all true." We confess our inability to see the importance of the omission of the word "all" in the affidavit.

The next objection, urged orally, is that the husband has not authorized his wife to bring this suit. It is alleged in the petition that she is authorized by her husband, and this is not specially denied. But the injunction bond is signed by the husband to aid and authorize her to sign it. That is sufficient proof that he has authorized the institution of the suit.

The judgment of separation was obtained before the existence of the debts of the seizing creditors, and the property was acquired by the wife after the judgment of separation, and appears to have been exclusively under her control and management. The judgment in her favor is correct.

It is therefore ordered that the judgment be affirmed with costs of appeal.

No. 491.

CITY OF SHREVEPORT v. J. W. JONES.

The judgment appealed from in this case was not rendered without due process of law, as alleged. Publication of notice to the taxpayer, as provided by law, is the mode of citing delinquent taxpayers in the city of Shreveport, and that is due process. The Legislature has the power and discretion to regulate the manner of citing parties to appear before the courts of the State.

The title of the act incorporating the city of Shreveport is, "An Act to incorporate the city of Shreveport, define its limits and provide for its better police and municipal government." Taxes are necessary to "provide for the better police and municipal government" thereof, and germane to the objects indicated in the title of the law; and this satisfies the requirements of the constitution.

A PPEAL from the Parish Court, parish of Caddo. *Cresswell, J. T. Alexander*, for plaintiff and appellee. *J. W. Jones*, defendant, in *propria persona*.

LUDELING, C. J. This is an appeal from a judgment condemning the defendant to pay \$255 38 city taxes and costs.

The only questions which are cognizable by this court are those relating to the constitutionality of the law regulating said taxes.

First—The defendant says "the judgment was rendered without due process of law, and is contrary to the constitution of the United States and of this State. The judgment was rendered after due publication of the notice as provided by law. This is the mode of citing delinquent taxpayers in the city of Shreveport, provided by law, and that is due process. The Legislature has the power and discretion to regulate the manner of citing parties to appear before the courts of the State.

Second—Because “the act of the Legislature incorporating the city of Shreveport, approved twenty-seventh of April, 1871, is unconstitutional, and repugnant to article 114 of the constitution of this State, for the reason that the object or objects of the law, as to the mode of citing delinquent taxpayers is not expressed in its title, for which reason, the want of legal citation, the judgment is null and void.”

The title of the act questioned is, “an act to incorporate the city of Shreveport, define its limits, and provide for its better police and municipal government.”

This title is comprehensive and full, and clearly indicates the objects of the act incorporating the city of Shreveport. To “provide for its better police and municipal government” taxes are necessary, and germane to the objects indicated in the title of the law; and this satisfies the requirements of the constitution.

It is therefore ordered that the judgment of the lower court be affirmed with costs of appeal.

No. 495.

THE CITY OF SHREVEPORT v. A. FLOURNOY, Sheriff, et al.

The objection that there was not sufficient evidence to authorize the order of executory process can not be examined on an injunction. The remedy was by appeal.

Under its charter the city of Shreveport has express authority to buy property. Authority to buy carries with it by implication authority to give notes for the price.

The objection that the defendant had no title to the lots purchased by the city is of no force. No eviction has been complained of, and no tender or offer has been made to return the property to defendant. The city of Shreveport can not keep the property and refuse to pay the price.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J. M. O. Elstner*, for plaintiff and appellant. *Land & Taylor*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment dissolving the injunction sued out by it to restrain the executory process sued out by the defendant to enforce the payment of the price of three lots sold by the defendant to the plaintiff.

The objection that there was not sufficient evidence to authorize the order can not be examined on an injunction. The remedy was by appeal.

The city passed an ordinance authorizing the acquisition of the property, and under the charter the mayor had authority to carry into effect the ordinance and buy the lots from the defendant. Under the charter, the city of Shreveport had express authority to buy property. Authority to buy carries with it by implication authority to give notes for the price.

26	709
45	1135
26	709
109	776
109	782

Dugan et al. v. Police Jury of the Parish of St. Charles et als.

The objection that the defendant had no title to the lots is of no force. No eviction has been complained of, and no tender or offer has been made to return the property to defendant. The city of Shreveport can not keep the property and refuse to pay the price.

The other objections are without weight.

The appeal is frivolous. As no damages have been asked, none can be granted.

Judgment affirmed.

No. 490.

LOUISA C. BRACEY and HUSBAND v. JAMES S. RAY, Assessor and Collector.

The right of the Legislature to delegate the power of taxation for municipal purposes to a municipal corporation, and the right to allow the corporation to adopt rules for the collection of the same has already been decided affirmatively.

Prior to the day on which the sale of the property seized for tax was to take place, the delinquent taxpayer paid the tax, and enjoined the sale with regard to the penalty. The injunction improperly issued. After default the penalty was due as well as the amount of the tax and was equally exigible.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J. A. L. Slack*, for plaintiff and appellee. *W. W. Farmer*, for defendant and appellant.

MORGAN, J. The right of the Legislature to delegate the power of taxation for municipal purposes to a municipal corporation, and the right to allow the corporation to adopt rules for the collection of the same has been decided affirmatively.

In this case the plaintiff was a delinquent taxpayer. The tax was due on the thirty-first December. The moment it fell due and was unpaid, the penalty for her default attached. Her property was seized. Prior to the day upon which the sale was to take place, she paid the tax and enjoined the sale with regard to the penalty. The injunction improperly issued. After default the penalty was due as well as the amount of the tax, and was equally exigible.

The position that her property was about to be sold without due process of law is untenable. The seizure was, we think, made in accordance with law, and the sale was advertised to take place under its provisions.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be avoided, annulled and reversed, and that the injunction herein issued be dismissed, plaintiffs to pay costs in both courts.

Rehearing refused.

 Gillis v. Dansby et al.

No. 456.

MARCELLIN GILLIS v. J. D. DANSBY et al.

A contract made in bad faith can not be rescinded unless it operate to the injury of the party complaining. A sale may be fraudulent and simulated, and yet not injure the complaining creditor.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J.* Jury trial. *Egan & Hayes*, for plaintiff and appellant. *J. & J. W. Young*, for defendants and appellees.

HOWELL, J. This is a suit to annul a judgment against the defendant, J. D. Dansby, and in favor of his minor children and to set aside a sale of land made under said judgment, on the ground of a fraudulent simulation.

The defendants excepted that the petition disclosed no cause of action, in this, that it did not allege that either the judgment or sale attacked operated to the prejudice or injury of plaintiff, and did not allege that the debtor of plaintiff was insolvent.

This exception should have been maintained and the action dismissed. An action can only be brought by one having a real and actual interest which he pursues. C. P. 15.

A contract made in bad faith can not be rescinded unless it operate to the injury of the party complaining. R. C. C. 1978. A sale may be fraudulent and simulated and yet not injure the complaining creditor. It may be, so far as the petition discloses, that J. D. Dansby can pay the plaintiff's claim. The allegation of injury is necessary.

It is therefore ordered that the judgment and verdict below be set aside, and proceeding to render such judgment as should have been rendered on the exception of defendants, it is ordered that said exceptions be maintained and the action of plaintiff be dismissed with costs in the lower court, the costs of appeal to be paid by appellees.

 No. 435.

HEIRS OF M. W. ASHLEY, deceased, v. ADAM RISER et al.

One who has availed himself of a judgment and made it his own by issuing a *feri facias* and collecting money thereon is estopped from denying its validity.

APPEAL from the parish court, parish of Jackson. *Revis, J.* *Jas. E. Hamlett*, for plaintiffs and appellants. *M. M. Smith*, for defendants and appellees.

WYLY, J. The plaintiffs appeal from the judgment rejecting their demand to annul the judgment homologating the final account of the defendants, the administrators of their father's succession, on the ground that they were not cited. In bar of this proceeding the de-

Heirs of Ashley v. Riser et al.

fendants plead that the plaintiffs have acquiesced in said judgment and are estopped, because, they have issued execution thereon and collected under *fiery facias* part thereof.

One who has availed himself of a judgment and made it his own by issuing a *fiery facias* and collecting money thereon, is estopped from denying its validity. The plaintiffs are estopped from denying the validity of the judgment which they have enforced against the defendants.

They were all of age or emancipated when their attorney issued the *fiery facias* and collected the money and they have not disavowed his authority to represent them.

Judgment affirmed.

No. 483.

PEET, YALE & BOWLING v. S. H. RILEY & Co. et al.

Where a promissory note was signed in the name of a partnership after the dissolution thereof by the death of one of the partners and the party who signed it was not authorized to do so for the firm, but where it was also fully proved that the only member of the firm before the court, in his individual and fiduciary character, acknowledged his liability on the note and promised specially to pay it, and that it was given for a debt of the firm, which he assumed to pay as the transferee of the interest of the other surviving partner;

Held—That he was, under these circumstances, bound to pay the claim sued on.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Morrison & Farmer*, for plaintiffs and appellants. *Wells & Williams*, for defendants and appellees.

HOWELL, J. This is a suit on a promissory note signed S. H. Riley & Co., in favor of the plaintiffs, the defense to which is that the note was made after the dissolution of the partnership by the death of one of the parties, and the party who signed it was not authorized to do so for the firm. The proof sustains these facts; but it is also fully proved that the only member of the firm, H. F. Vickers, who is now before the court, in his individual and fiduciary character, acknowledged his liability on the note, and promised specially to pay it, and that it was given for a debt of the firm which he assumed to pay as the transferee of the interest of the other surviving partner. Under these circumstances we think he should be held to pay the claim as sued on.

It is therefore ordered that the judgment appealed from be reversed as to H. F. Vickers, and that he be condemned to pay plaintiffs the sum of nineteen hundred and eighty dollars and eighty-four cents, with eight per cent. interest thereon from twenty-first June, 1872, and costs in both courts.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

NOVEMBER, 1874.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	} <i>Associate Justices.</i>
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. P. H. MORGAN.	

No. 3523.

KEHLOR, UPDIKE & CO. v. KEMBLE, HASTINGS & CO.

The failure of the principal to repudiate immediately, or within a reasonable time, the acts of his agent when informed of them, must be construed into an acquiescence.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Breaux, Fenner & Hall*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendants and appellants.

HOWELL, J. The plaintiffs allege that they shipped to the defendants in Boston, Massachusetts, three lots of flour, with instructions to sell immediately on arrival, and that in disobedience to said instructions they held the flour until it greatly declined in value and sold at a loss, for which they ask judgment.

The defendants answer that they received the flour to be sold for account of plaintiffs as alleged; that they made large advances to the plaintiffs on said shipments; that after the flour was sold and all credits allowed, the plaintiffs were in debt to them for a large balance, which the plaintiffs admitted and promised to pay, and which is claimed in reconvention. Judgment was rendered in favor of plaintiffs for a part of their claim, and the defendants appealed. The district judge thought the plaintiffs ratified the acts of the defendants up to a certain date and made the latter responsible for the loss after that date. We agree with him that the acts of the plaintiffs during that time were a

Kehlor, Updike & Co. v. Kemble, Hastings & Co.

ratification of defendants' course, but we think the same effect should be given to the acts of the plaintiffs after the said date. It was on the twentieth July, 1868, that the defendants received the last instructions, and the sales were not completed until in September; but it is shown that the plaintiffs were duly informed, by letter and telegraph, of what the defendants were doing, and they did not object until the sales were closed out and the final account, showing the amount of the loss, was rendered. Having overlooked the departure from former instructions, the defendants might construe their subsequent silence to a similar disposition to take the chances of the market, particularly as the plaintiffs were regularly kept advised of the condition of the market and the difficulty of effecting favorable sales, and of the sales as they were made by the defendants. We think the failure of the plaintiffs to repudiate, immediately or within a reasonable time, the acts of their agents when informed of them, must be construed into an acquiescence. See 3 An. 468; 6 An. 538; 12 An. 159; 7 N. S. 143; 16 La. 51; 18 La. 517.

It is therefore ordered that the judgment appealed from be reversed, that the demand of plaintiffs be rejected, and that defendants recover of plaintiffs on their reconventional demand, fourteen hundred and seventy-eight dollars and ninety-five cents, with six per cent. interest from thirtieth September, 1868, and costs.

No. 4807.

M. D. F. H. BROOKS v. MRS. M. W. STEWART AND HUSBAND.

Where the act of mortgage to secure the payment of a note given for a valid consideration by a married woman, separate in property from her husband, was dated on the eleventh of May, the authorization of the judge dated on the tenth, and the note on the first of the same month:

Held—That though the note bears a different date from the act of sale and mortgage, it was given for a part of the price thereof; that it formed part of the same transaction, and that the authorization of the judge covered the debt in question, which inured to the benefit of the wife.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp, J. E. John Ellis, Wm. Duncan, G. W. H. Marr*, for plaintiff and appellant. *B. Edwards, S. D. Ellis*, for defendant and appellee.

LUDELING, C. J. This is an action on a note for \$3000, dated May 1, 1867, due one year after date, executed by the defendant, a married woman, with the authorization of her husband, and it is secured by a mortgage executed by her with the authorization of the judge.

The defense is that the act of mortgage is dated eleventh of May, and the authorization of the judge is dated tenth of May, whilst the note is dated first of May, and that under the authority of *Falconer v.*

 Brooks v. Mrs. M. W. Stewart and Husband.

Stapleton, 24 An. 89, the subsequent authorization of the judge could not give validity to a pre-existing debt. We are satisfied, in this case, that though the note bears a different date from the act of sale and mortgage, it was given for a part of the price thereof and formed part of the same transaction, and that the authorization of the judge covered the debt in question. And we are further satisfied that the debt inured to the benefit of the wife.

It is therefore ordered and adjudged that the judgment of the court *a qua* be annulled, and that there be judgment in favor of the plaintiff and against the defendant for three thousand dollars, with eight per cent. per annum interest from eleventh of May, 1867, and costs. It is further ordered that the mortgage given on the property described in the act of mortgage be recognized and made executory.

Rehearing refused.

 No. 4788.

UNION INSURANCE COMPANY v. SUCCESSION OF C. W. RODD.

At the maturity of the note sued upon in this case, it was protested without presentation for payment, or demand on any one for payment, and it is not proved that it was impossible to make a demand for payment. This was necessary to bind the indorser.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Kennedy & Chiapella*, for plaintiff and appellee. *Semmes & Mott*, for defendant and appellant.

LUDELING, C. J. This is a suit against the succession of an indorser on a promissory note. The defense is want of demand of payment of the maker, and due service of notice of protest on the legal representatives of the deceased.

At the maturity of the note, it was protested without presentation for payment, or demand on any one for payment, and it is not proved that it was impossible to make a demand of payment. This was necessary to bind the indorser.

In *Toby v. Maurian* this court said: "It is clear that no recourse can be had against an indorser on a note, until a demand has been made on the maker, if living, or on his heir or legal representative after his death, unless the impossibility of making such a demand is made apparent. * * The authorities on this point, and which support the position here laid down, are numerous, of the highest character and authority, and conclusive on the subject. *Chitty on Bills*, 317; *Bayley on Bills*, 128; 3 *Peters*, 89; 7 *id.* 227; 7 *Mart.* 364; 1 *Pardessus*, 392; *Pothier Contrat de Change*, No. 146."

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment against the plaintiff, dismissing this demand as in case of nonsuit, with costs.

Brigham, Curator, v. Bussey et al.

No. 2396.

MARY WOODS v. J. VIOSCA, JR., AND JOAQUIM VIOSCA.

The plea of *lis pendens* is not well founded. The plaintiff is not shown to have acquired the note from the payee after maturity, and therefore the equities pleaded are not available. The account or indebtedness of the payee to the maker of the note in a suit pending on appeal, can not compensate the note held by the plaintiff, even though she acquired it after due.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. B. Long, Billings & Hughes*, for plaintiff and appellee. *E. E. Mix*, for defendants and appellants.

WYLY, J. In this suit on a promissory note, there was judgment against the maker thereof, J. Viosca, Jr., and he has appealed. The plea of *lis pendens* is not well founded. The plaintiff is not shown to have acquired the note from the payee after maturity, and therefore the equities pleaded can not avail the appellant. Besides, the account or indebtedness of the payee to the appellant in a suit pending on appeal, can not compensate the note held by the plaintiff, even though she acquired it after due.

Judgment affirmed.

No. 4750.

STATE OF LOUISIANA v. THE ECLIPSE TOWBOAT COMPANY.

This is a suit for the payment of taxes and penalties. The judge *a quo* erred in including the \$2 25 allowed the collector, in the principal or amount of the taxes on which the penalties are calculated. This sum of \$2 25, composed of \$2 for the suit and 25 cents for notice, are simply costs and are not a part of the amount due the State.

In the *feri facias* which, it seems, was prematurely issued, the clerk has incorrectly interpreted the judgment and issued execution for items not embraced in the judgment as rendered. The officers of the law, collector, clerk, sheriff and any others, can not be too careful in conforming to the exact provisions of the law in the discharge of their duties.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, for plaintiff and appellee. *Fellows & Mills, Julien Michel, T. Gilmore & Sons*, for defendant and appellant.

HOWELL, J. This is a suit for the taxes of 1871, and the defendants complain that there is no evidence, and none was offered to sustain the demand. According to the jurisprudence we must presume the judge had sufficient evidence before him to justify him in rendering the judgment; but there seems to be an error on the face of the record in the date, from which the penalties are made to take effect, which is probably an error in writing the judgment. The penalties accrue only after December 15, 1872 instead of 1871, and we think the judge erred in including the \$2 25 allowed the collector in the principal or amount of the taxes on which the penalties are calculated. This sum of \$2 25,

State of Louisiana v. The Eclipse Towboat Company.

composed of \$2 for the suit and 25 cents for notice, are simply costs, and are not a part of the amount due the State. We deem it of importance to correct this error, because we perceive from the *feri facias*, which it seems was prematurely issued, that the clerk has incorrectly interpreted the judgment, and issued execution for items not embraced in the judgment as rendered. The officers of the law, collector, clerk, sheriff and any others, can not be too careful in conforming to the exact provisions of the law in the discharge of their duties.

It is therefore ordered that the judgment appealed from be amended to read as follows :

“It is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, the State of Louisiana, and against the defendant, Eclipse Towboat Company in the sum of seven hundred and fifty-two dollars and fifty cents, with twenty-five per cent damages for each year or part of year, from fifteenth December, 1872, until paid, five per centum on the total as attorney's fees, two dollars and twenty-five cents to the tax collector, and the costs of suit in the lower court.

No. 4667.

Widow GEORGE L'HOTE v. ANDRE DUBUCH and Widow DUBUCH,
Administratrix.

Where the order directs the mortgaged property to be sold according to law, and the writ of seizure has no reference whatever to a certain sum of \$49 80, as insurance premium, the plaintiff must be presumed to have abandoned the claim first set up for it.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. W. E. Murphy*, for plaintiff and appellee. *F. Fuselier*, for defendants and appellants.

TALIAFERRO, J. Andre Dubuch and widow Dubuch, administratrix, appeal from an order of seizure and sale granted upon a mortgage note for the sum of five thousand dollars with interest.

The defendants have filed an assignment of errors in this court; the one principally relied upon seems to be that the order directs that the five per cent. attorney's fees be charged on the sum of \$49 80, insurance premium of which no authentic evidence shows either the payment or the amount.

The order directs the mortgaged property to be sold according to law, and the writ of seizure has no reference whatever to the \$49 80 as insurance premium, and the plaintiff must be presumed to have abandoned the claim at first set up for it. The defendants can receive no injury from it.

It is therefore decreed that the order appealed from be confirmed with costs.

Micou et al. v. J. P. & J. Benjamin and Day.

No. 2301.

T. MICOU et al. v. J. P. & J. BENJAMIN and L. MADISON DAY.*

Under the act of Congress, July 17, 1862, known as the confiscation act, and the joint resolution of the same date, explanatory of it, only the life estate of the person for whose offense the land has been seized, is subject to condemnation and sale.

When such person has, previously to his offense, mortgaged his land to a *bona fide* mortgagee, the mortgage is not divested. His estate and property in the land being but the land subject to the mortgage, any sale made in pursuance of the act passes the life estate subject to the charge.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Campbell, Spofford & Campbell*, for plaintiffs and appellees. *L. Madison Day*, defendant and appellee, in *propria persona*.

HOWELL, J. This is a hypothecary action, instituted to subject certain property to a mortgage granted by J. P. & J. Benjamin to plaintiffs' ancestor in the year 1858.

The only defense to the suit is made by the third possessor, who claims that he is a *bona fide* purchaser for value, without notice, from the United States under a decree of condemnation and sale, made by the United States District Court in New Orleans, in the case of the United States v. Two squares of Ground, the property of J. P. Benjamin, under the provisions of the confiscation act of July 17, 1862, (12 Statutes at Large, page 589), and which decree of condemnation and sale is relied on as a complete bar to plaintiffs' action.

Passing over the questions relating to the jurisdiction of the United States District Court, arising from alleged irregularities in the proceedings and the effect of the decree upon the rights of the alleged joint owner, and conceding the constitutionality of the act of July 17, 1862, to be authoritatively determined by the Supreme Court of the United States, we will direct our attention to the scope and effect of the said decree and sale under the terms and provisions of the said act, and on the hypothesis that J. P. Benjamin was the sole owner of the property at the date of the sale.

It is strenuously contended by the third possessor, who is appellant from a judgment in favor of the plaintiffs, that the sale by the marshal vested in him, as purchaser, a complete title in fee simple to the whole of the land sold, free of all incumbrance, because in a proceeding *in rem* it was condemned as enemy's property and not as the property of an offender against the municipal laws of the United States, and because under a rule of the United States District Court, adopted by authority of the confiscation act, all mortgages and incumbrances were canceled and erased by the marshal, and in support of his position he invokes many authorities relating to the validity and effect of

*Carried by writ of error to the Supreme Court of the United States and affirmed. See 18 Wallace's Reports, page 156.—REPORTER

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proceedings *in rem* in admiralty and revenue cases, and the recent decisions in 11 Wallace U. S. R. upon the said confiscation act.

We readily grant the correctness and force of the authorities quoted in regard to proceedings *in rem* in admiralty and revenue cases, and might admit their application, as claimed, in this class of cases, did we not think the interpretation given by the United States Supreme Court, in the cases of *McVeigh v. United States*, 11 Wallace 266, and *Bigelow v. Forrest*, 9 Wallace 339, to the said act of Congress and the joint resolution (No. 63, 12 Statutes at Large 627), passed in connection therewith, modifies and limits such application to a material extent. In the former case, similar to the one against Benjamin's property, the court held that it was so unlike a proceeding purely *in rem*, where no claimant is named and none appears until after the final decree or judgment is entered and the case has terminated, that the party whose property is proceeded against is entitled to appear and to contest the charges upon which the forfeiture is claimed, and that his guilt and ownership are fundamental in the case. In the latter case it was held: "That the act and resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized," and that the estate acquired by the purchaser at the marshal's sale expired at the date of the death of the said person. The point was plainly and fairly presented on behalf of Bigelow, "that the decree of confiscation in the district court of the United States is conclusive that the entire right, title, interest and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple, that entire fee simple was confiscated and sold." But in reply the court says: "Under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction. * * * The argument assumes what can not be admitted, that the decree of the district court established a confiscation reaching beyond the life of French Forrest, for whose offense the land was condemned and sold."

Taking these decisions as authority binding on us in the interpretation and construction of the legislation of Congress on this particular subject, we must conclude that the purchaser in this instance acquired only a right to the property sold, which is to terminate with the life of Benjamin, for whose act it was confiscated, and we think it follows as a legal consequence that the mortgage, granted by him prior to the passage of the confiscation act, was in no manner affected or impaired

by the sale. The law itself makes no provision for the extinguishment of mortgages on real property. It makes no reference whatever to the subject of mortgages, and as it authorizes the sale of only a life interest in the real estate and not the property in fee simple, which is the subject of the mortgage, it seems clear that the mortgage still exists on the property unimpaired. "The mortgage is a real right on the property bound for the discharge of the obligation," (R. C. C. 3282), and is extinguished only in the modes prescribed by law or the consent of the parties. In some instances, specially provided by law, where mortgaged property is sold for specific purposes and under certain formalities, the mortgage attaches to the proceeds and the property passes to the purchaser free. But this result is expressly provided for as declared by special enactment, and only in regard to mortgages created after the law is enacted. Hence we are not lightly to presume that a law is intended to work such a result, when such intention is not clearly expressed. But this principle does not apply in this case, for the statute does not so direct, and the property in full ownership was not sold under its provisions, but in imperfect ownership—the life interest of the mortgageor—his use, enjoyment and dominion thereof for life, without injury to the rights of those who had real rights to exercise thereon. Nor can it be successfully asserted that the mortgage was extinguished by reason of the proceeding being one purely *in rem*, and thus conveying a title good against all the world, because, according to the doctrine in *Bigelow v. Forrest*, no such title was conferred. The title acquired by the purchaser is not good against the heirs of Benjamin, and it can not be pretended that, had he died soon after the sale, his heirs would have taken the property free of the mortgage, which he had imposed on it. It was never contemplated that the confiscation of an enemy's property should operate the extinguishment of his obligations and transmit his property to his heirs in a better condition than he himself could have done. No construction of the act of Congress which works such results can be accepted.

The estate acquired by the appellant may be assimilated to the usufruct under our system of laws, by which the property in usufruct passes to the usufructuary with all the burdens imposed by the owner. R. C. C. 557, 582, 583. If it be an estate for life, as shown to the common law, the mortgage created by the original owner still exists, and the tenant for life—the life of Benjamin—is in no better condition under the confiscation law than if Benjamin had voluntarily put him in the position in which the United States have put him. Under this system the rule is that the tenant for life shall keep down the interest due upon the mortgages and other incumbrances, though he is not bound to pay off the principal. *Bisset on Estates for Life*, 273; 4 Kent,

§ 74 to 75. This implies of course the existence of the mortgages. Again, it is said: "If the estate is sold to discharge incumbrances, the income of the surplus beyond what is necessary to discharge the incumbrances, is to go to the tenant for life during his life, and upon his death the capital is to be paid out to the remainder man, or reversioner." Bisset on Estates for life, 274.

Here the right of the mortgagee to sell the property held as a life estate, in order to pay off his mortgage, is clearly recognized.

It is, however, unnecessary for us to determine precisely the nature, character and conditions of the estate conveyed to the purchaser under this act of Congress. It is sufficient to know that a complete, absolute, indefeasible title was not conveyed, and that without such and without some express provision or direction in the law, or some necessary effect in the judicial proceedings for the removal of the real right resting on and inhering in the property itself, the mortgage, which was duly recorded, is not invalidated.

The authority granted in the act to the United States District Court to make such orders and establish such forms of decrees of sale, and direct such deeds and conveyances to be executed, where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act, and vest in the purchaser good and valid titles, does not, under the limitation contained in the joint resolution, extend to the removal of incumbrances on the property, for the plain reason that it was not the purpose of the act, under said limitation, to sell that part of the estate, the fee simple, which was affected by the mortgage. And hence the act of the marshal in removing the mortgage was ineffectual.

But it is argued that the case of *Bigelow v. Forrest* is overruled by the later cases of *Miller v. United States*, 11 W. 268, and *Tyler v. Defrees*, ib. 331. In this we are not prepared to concur.

An examination of these several cases is necessary to ascertain what was decided in each, and it will, we think, be apparent that they do not conflict.

In the first case, *Douglass Forrest*, the defendant in error, was the sole heir of his father, *French Forrest*, whose property (real estate) had been confiscated, and he was claiming, in an action of ejectment, the property from *Bigelow*, the vendee of the purchaser at the marshal's sale. The parties were such as, necessarily and appropriately, to raise the question as to the nature and quantity of the real estate conveyed by the confiscation sale, and to determine the purview of the act and joint resolution in this regard. In the discussion of the question, the court referred to the history of the joint resolution, and the constitutional difficulty, suggested by the President, which it was intended

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to obviate, and held that its legal effect was to restrict the operation of the act to the sale of only a life interest in real estate seized under its provisions. The court deliberately declared that under the said "act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction." And the judgment restoring the property to the heir was affirmed by a unanimous court.

The case of Miller was a proceeding under the act of August 6, 1861, and the above mentioned act of seventeenth July, 1862. to confiscate personal property, and consequently the question in the Bigelow case, in regard to real estate, could not and did not arise. The questions raised and discussed related to the jurisdiction, sufficiency of proof, necessity of trial by jury and the constitutionality of the acts of Congress, under which the proceedings then before the court for the confiscation of Miller's property were had, and they were all decided by a majority of the court in favor of the United States. The contest, apart from the mode of procedure, was in regard to the right to confiscate the property, and not to its restoration after confiscation—to the constitutional power of Congress to confiscate the property of offenders as a punishment for crime—it being contended that the purpose of the act of 1862 to punish offenses against the sovereignty of the United States, and that it is in conflict with the fifth and sixth amendments of the constitution, which require a finding by a grand jury and a speedy trial by a jury in the State and district wherein the crime shall have been committed. The court held that in this respect the act had two distinct purposes, to wit: To provide, first, as it did in the first four sections, for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto, which was an exercise of the sovereign, and not the belligerent rights of the government; and secondly, in the subsequent sections, which have in view a state of public war, for the seizure and sale of the property of public enemies, which was the exercise of the war power of Congress, to which there is no restriction in the constitution. It was declared that those engaged in the rebellion were enemies as well as offenders, and that without reference to their liability to punishment for crime, their property could be seized as enemies' property, under the conceded right of the government to confiscate the property of all public enemies. As to what this right is, the court say: "It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership.

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It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property." The case of the *Venus*, 8 Cranch 255, is quoted as establishing this doctrine.

This and much more is said *arguendo*, to maintain the constitutional right of Congress, under the war power, to confiscate the property of all enemies, including the inhabitants of the insurgent States, but not to determine to what extent that power had been exerted in the confiscation of real estate. That point had been settled in the *Bigelow* case and was not in the case then before the court, and was not alluded to in the opinion of the court or the dissenting opinions. Nor is there anything in the whole case, as we understand it, inconsistent with the reasoning and decision in the *Bigelow* case on the point as to the limitation on the power of the court to sell real estate. It is well to remark further that the opinion of the court in each of these two cases was delivered by the same justice, and it can hardly be imagined that under the circumstances the earlier case would have been deliberately overruled without some allusion to the fact, or that it could have been overruled by mere inadvertence.

The case of *Tyler* was an action of ejectment, instituted by the party himself, whose real property had been confiscated, to recover it, from the vendor of the purchaser at the marshal's sale; and here again the question of fee simple or life estate was not involved nor referred to. The proceedings as to *Tyler* were final and conclusive, just as they are in the *Benjamin* case as to him, and it can make no practical difference to either, whether it was his fee simple or his life estate, which was seized and sold, and hence the point was irrelevant. The doctrine in the *Miller* case was affirmed and held to govern the case of *Tyler*—the principal question being a jurisdictional one, growing out of the mode of seizing real estate. In this case also there was a dissenting opinion, and no allusion whatever was made in either of the opinions to the *Bigelow* case or the main question decided in it.

Until deliberately overruled we must accept the *Bigelow* case as the law on the question material to the decision of the case at bar. The question then, as now, was not what Congress might have done in the way of confiscating enemies' property, but what Congress actually did. We may concede that under the war power Congress had the right to order the seizure and sale of the fee simple of all enemies' real estate, but it by no means follows that Congress has done so in the act of July, 17, 1862. On the contrary, as construed by the United States Supreme Court, the language of the joint resolution, by which Congress chose to limit the operation of the act, clearly refers to and controls the whole act. It does not refer merely to the punishment of offenders,

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for its 'ys, "punishment or proceedings under said act." It does not refer merely to the first four sections, for it speaks of the act as a whole.

We are constrained therefore to conclude that the sale made by the marshal, under the order of the United States District Court, did not vest in the purchaser a fee simple title to the land in question and did not extinguish the mortgage existing on it at the time, and that the plaintiffs have established the legal right to enforce their mortgage upon said property in his hands.

Judgment affirmed.

Rehearing refused.

TALIAFERRO, J., dissenting. I dissent from the opinion of the majority of the court for the following reasons:

The act of Congress of July 17, 1862, was enacted for several purposes, and embraces different and distinct objects. Among these objects, two are prominent:

First—To punish treason and rebellion.

Second—To seize and confiscate the property of rebels.

The first three sections declare the punishment to be inflicted upon persons convicted of treason against the United States, or of inciting, assisting or engaging in rebellion against the United States. Persons convicted of either of these offenses incur pains and penalties that are to affect them personally. In the case of treason they are to suffer death or imprisonment not less than five years, at the discretion of the court; to be fined not less than ten thousand dollars, and to be deprived of the ownership of slaves, if they own any, the fine to be levied and collected on any or all of the property, real and personal, excluding slaves. In the case of inciting to rebellion, or aiding or assisting therein, etc., imprisonment not to exceed ten years, a fine not exceeding ten thousand dollars, liberation of slaves, if owning slaves, etc., at the discretion of the court. In either case, the person convicted to be forever incapable of holding any office under the United States.

Let it be observed that the provisions of these three sections of the act apply to any and all persons without distinction.

The fourth section has no immediate bearing on the subject of the penalties prescribed for offenses under the act.

The fifth section makes it the duty of the President of the United States to cause the seizure of all the estate, property, etc., of every kind of certain persons designated therein in six different classes, and to apply and use the same and the proceeds thereof for the support of the army of the United States.

The succeeding sections provide the mode by which the provisions

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of the fifth section shall be carried out. The proceedings are to be *in rem*. The courts to be vested with power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances, where real estate is sold, as shall vest in the purchasers of such property good and valid titles.

Here, then, we have by this fifth section an entirely different purpose of the legislator. He does not appear here as the avenger of wrongs, nor does he evince the disposition to punish the wrong doer corporeally or by fine or disabilities. That, he has already done in his sovereign capacity by the provisions of the first three sections. He now, by the right which belongs to him by the established rules of war, avails himself of the property of those who have assumed toward the nation the attitude of public enemies, to obtain means to help support his own armies by depriving his enemies to that extent of means to support theirs. That Congress possesses this right under the war power there is, I conclude, no doubt whatever. It is a right inherent in the nation from the order and fitness of things, and which I can not clearly perceive how it can divest itself of. Unless there be something clearly and directly indicating that Congress has ignored this right or absolutely refused to exercise it, I must think the provisions of the fifth section show that it did exercise it. There is certainly no good reason why Congress should deprive itself of that important power, and more especially when the same power was resorted to by the formidable coalition then raised against the very life of the nation.

The resolution bearing the same date with the act, provides that no "punishment or proceedings under said act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

It is referred to as matter of history that this resolution was passed in conformity with the views of Mr. Lincoln to relieve his doubts of the constitutionality of the act. That being the avowed purpose for which the resolution was passed, the proviso it contains should bear only against that part of the act, if any, which is obnoxious to the objection raised by the President. A fair interpretation, then, of the resolution, it would seem, would restrict it to those sections which provide for the punishment of offenders. The fifth section of the act provides for the exercise of rights arising from the war power, and are clearly free from constitutional objections. If, then, under proceedings authorized by the sixth, seventh and eighth sections of the act, property owned at the time of its passage by persons designated under the fifth section has been sold, what is to prevent the purchaser from getting a fee simple title? He acquires, as the law declares, a good and valid title, and this must mean a title in fee, unless the qualifying

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terms of the resolution limit it to a lifetime estate; and it clearly appears to me it does not in this case, as the property was not sold under *fiery facias* to satisfy a personal judgment against Benjamin, imposing a fine or forfeiture, but the proceeding was *in rem*, and assimilated in all respects to admiralty proceedings. The case of *Bigelow v. Forrest*, 9 Wallace 339, seems at variance with the views here taken, which, however, I think, are sustained by the subsequent decisions of the Supreme Court of the United States, and especially the cases of *Miller's Executor v. the United States* and *Tyler v. Defrees*, reported in 11 Wallace. If these cases conflict with the views expressed in *Bigelow v. Forrest*, the authority of the latter case would seem to be overruled. But the plaintiffs hold that whatever be the effect of the decree as to Benjamin, their rights are not impaired; that their mortgage follows the property; that it was not the purpose of the act of Congress of July, 1862, to involve the innocent with the guilty, and that no condemnation of the latter can affect the former. This plea I think entitled to but little consideration. The action was *in rem*, purely an admiralty proceeding in form. The usual monition was published. All persons were notified to come forward and make known their objections, if any existed, why the sale should not be made. This stood in the place of personal citation, and was equivalent to it. It was then incumbent upon the plaintiffs to have made objection, or to have claimed priority in the distribution of the proceeds. The purchaser obtained the property free of all claims or liens whatever, and I think judgment should be given in his favor.

Rehearing refused.

No. 4944.

STATE OF LOUISIANA v. S. W. EDGAR.

This suit having been brought in October, 1873, and the judgment rendered on the second October following, it was an error to allow a penalty, because until the fifteenth of December, 1873, the defendant was not a delinquent taxpayer for the year 1872.

That the defendant's property was not accurately described on the tax roll, is no reason why he should except to the suit, or escape the payment of his taxes to the State. The court *a quo* did not err in treating his exception as an answer and proceeding with the trial.

The judge *a quo* erred when he permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins J. A. P. Field*, Attorney General, *F. N. Butler*, for plaintiff and appellee. *L. E. Simonds*, for defendant and appellant.

WYLY J. The defendant, who was sued for \$752.50, the amount of his State taxes for 1872, appeals from the judgment condemning him to pay said amount, with five per cent attorney's fees and twenty-five per cent. per annum penalties, from fifteenth December, 1871.

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The suit was brought in October, 1873, and the judgment was rendered on the second December following. It was therefore an error to allow a penalty, because until the fifteenth December, 1873, the defendant was not a delinquent taxpayer for the year 1872.

Because the defendant's property was not accurately described on the tax roll is no reason why he should except to the suit or escape the payment of his taxes to the State. We think the court did not err in treating his exception as an answer and proceeding with the trial.

There was error, however, when the court permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

It is therefore ordered that the judgment herein be annulled, and that this cause be remanded for new trial, and to be proceeded in according to law, appellee paying costs of appeal.

Rehearing refused.

No. 5156.**ELIZABETH CROFTS v. JEREMIAH MOYNIHAN AND PATRICK IRWIN.**

Damages are considered an equivalent for the loss sustained by the delay consequent on the appeal. Hence no damages can be awarded when it does not appear that an appeal delayed plaintiff in executing or collecting his judgment.

A PPEAL from the Fifth District Court, parish of Orleans. *Oullom, J. E. T. Merrick, Kace & Foster*, for plaintiff and appellee. *T. Gilmore & Sons*, for defendant and appellant.

HOWELL, J. The only matter before us is plaintiff's right to damages for a frivolous appeal. Judgment was obtained against Moynihan as the maker of a note, and afterwards against P. Irwin as indorser and surety, from which he appealed. After the appeal was taken, Moynihan paid the judgment, including interest, attorneys' fees and costs, the receipt given by plaintiff containing a reservation of her "interests in the appeal taken by P. Irwin herein." Damages are considered an equivalent for the loss sustained by the delay consequent on the appeal. C. P. 907. It does not appear that the appeal taken by Irwin from the judgment against him delayed plaintiff in executing or collecting the judgment against Moynihan, from which no appeal was taken, but which has been fully paid and satisfied, as shown by plaintiff's receipt. The most we can do is to dismiss Irwin's appeal at his costs, there being no judgment for us to revise.

It is therefore ordered that the appeal herein be dismissed at costs of appellant.

Partegas et al. v. State National Bank.

No 4941.

ANTONIO PARTEGAS et al. v. STATE NATIONAL BANK.

J. M. Alva, as administrator of the estate of widow Forneret, opened an account in the Louisiana State Bank, which being balanced, July 31, 1862, showed to his credit the sum of \$6038 60 for deposits alleged to revert back to 1838. On the twenty-seventh October 1865, said administrator gave a check for said amount in favor of the State Treasurer, which was accepted by the Bank. On the twenty-fifth March 1873, suit was brought by the heirs of Widow Forneret to recover the said balance of deposits in gold, without making any reference to the check for said amount. On the ninth April 1873, they filed a supplemental petition making the accepted check the basis of the action;

Held—That the judgment of the court *a qua*, ordering the check to be paid in United States currency, and not in gold, was correct. But the defendant is only liable for interest from the ninth of April 1873, the day of judicial demand on the check.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. E. Bermudes*, for plaintiff and appellee. *James McConnell*, for defendant and appellant.

WYLY, J. On thirty-first July 1862, the Louisiana State Bank was owing a balance of deposits of \$6038 60 to J. M. Alva, administrator of the succession of Widow F. J. Forneret.

On twenty-seventh October 1865, said administrator gave a check for said amount in favor of the State Treasurer, which was accepted by said bank.

Subsequently, to wit: On twenty-fifth March 1873, the plaintiffs, the heirs of Widow Forneret, joined by J. M. Alva, administrator, brought this suit against the defendant, the successor to Louisiana State Bank, to recover the said balance of deposits, \$6038 60 in gold, without making any reference to the check for said amount, which had been accepted by the Louisiana State Bank, and they prayed judgment therefor, with legal interest from twenty-ninth April 1870.

On ninth April 1873, they filed a supplemental petition making the accepted check the basis of their action.

The court gave judgment for the amount claimed, with the interest prayed for, payable in United States currency.

The defendant appealed, and the plaintiff prays for an amendment of the judgment by allowing them to recover in gold the amount thereof.

We think the check accepted by the Louisiana State Bank can be discharged in United States currency, and that the judgment of the court in this respect was correct.

There is error, however, in that part of the decree allowing interest from twenty-ninth April 1870.

There is no evidence that the check accepted by the Louisiana State Bank was ever presented to the defendant for payment, or that there was any demand thereon prior to the ninth April 1873, when in the supplemental petition it was made the basis of judicial demand.

Partegas et al. v. State National Bank.

The rule taken on the Louisiana State Bank to pay the \$6038 60 in gold into court was never brought to trial, and that was a demand which did not put the defendant in default, because after accepting the check of their depositor, J. M. Alva, administrator, the Louisiana State Bank was only bound thereon, and it is not shown that plaintiffs in rule ever presented that check to defendant for payment.

The defendant is only liable for interest from ninth of April 1873.

It is therefore ordered that the judgment herein be amended by allowing interest to run only from ninth April 1873, and as amended that the judgment be affirmed, appellees paying costs of appeal.

No. 3572.

HORATIO WEEDON et als. v. ARTHEMISE LANDREAUX et als.

A party can not be permitted to allow his property to be sold under a judicial process and then claim the proceeds under the allegation that he did not owe the debt which the property was sold to pay.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Thomas J. Cooley and Ed. Phillips*, for plaintiffs and appellants. *Roselius & A. Philips*, for defendants and appellees.

MORGAN, J. In May 1857, plaintiffs purchased from Sosthene Roman a plantation and slaves. The price was \$270,532 39, of which \$50,000 were paid in cash. For the balance they gave their promissory notes, payable in six annual installments.

In May, 1861, four of the notes then due and unpaid were protested, and a writ of seizure issued at the instance of Sosthene Roman to enforce their payment. This writ was returned, and an alias writ issued in July 1865. Under this writ the property was sold, and was purchased by the defendants (the heirs of Sosthene Roman, he having died in the meanwhile) for \$120,000.

Plaintiffs claim that this \$120,000 was in excess of the amount remaining due by them, and they say that inasmuch as the original sale was for land and slaves, and as it is admitted that the slaves purchased were properly valued at \$120,000, and inasmuch as that portion of the contract was void, they are entitled to recover the \$120,000.

The exception of *res judicata* is opposed to the demand. The plea is based upon the executory process which issued from the Second District Court. If we admit that the plea can not be set up against the plaintiff, upon which point, however, we express no opinion, still we think that a party can not be permitted to allow his property to be sold under a judicial process and then claim the proceeds, under the allegation that he did not owe the debt, which the property was sold to pay.

Judgment affirmed.

Mrs. C. Desormeaux v. Moylan.

No. 3583.

MRS. C. DESORMEAUX, widow of S. B. SMITH, v. JOHN MOYLAN.

Where the proceedings in a tax suit are against a person who is not the owner of the property taxed, the sale in which they eventuated, can not affect the title of the real owner. Besides, it is seldom that more glaring irregularities and defective proceedings in other respects are ever exhibited.

APPEAL from the Sixth District Court, parish of Orleans, *Cooley, J. T. & E. J. Ellis*, for plaintiff and appellee. *R. King Cutler* and *Alex. F. Steele*, for defendant and appellant.

HOWELL, J. This is a suit by plaintiff a resident of this State, to be declared the owner of certain lots of ground in the late City of Jefferson, now New Orleans.

She exhibited title in her mother, in 1853 and mortuary proceedings, showing herself to be the only heir to and in the possession of the property.

The defendant set up title under a tax sale at the suit of the City of Jefferson, but the proceedings were against John Dorancourt and are in themselves so irregular as to have no legal effect. Being against a person not the owner of the property, they did not transfer or affect the title of the plaintiff. The defendant, as well as the officers making the alleged sale, must have known the irregularity and defects of the proceedings, as the mortgage certificate obtained and read at the offering, was in the name of Mrs. Clementine Desormeaux, wife of S. B. Smith, and not of John Dorancourt the defendant in the execution. It is seldom that more glaring irregularities and defective proceedings occur.

Judgment affirmed.

Rehearing refused.

No. 4712.

STATE OF LOUISIANA v. FRANCIS VALLETTE.

When default was entered and confirmed in this case, exceptions filed in due time were pending and not disposed of. This was irregular and entitles the defendant to a reversal of the judgment, and an opportunity to be heard on his exceptions.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins J. A. P. Field*, Attorney General, for plaintiff and appellee. *A. & W. Voorhies*, for defendant and appellant.

HOWELL, J. When default was entered and confirmed in this case, exceptions, filed in due time, were pending and not disposed of. This was irregular and entitles the defendant to a reversal of the judgment and an opportunity to be heard on his exceptions.

It is therefore ordered that the judgment and default herein be set aside, and this cause remanded for trial according to law.

Mrs. Louisa French, Executrix, v. Bach et al.

No. 3616.

MRS. LOUISA FRENCH, Executrix, v. JOHN M. BACH et al.

26	731
112	480

The ruling in this case of the court *a qua*, permitting the introduction of parol proof that one McMichael never owned the property in dispute, and that Spiller did, was clearly wrong.

McMichael having sold the property in dispute to French, and received one thousand dollars cash in consideration for it, executed his bond for title, and French, taking possession of it, expended eight hundred dollars in repairs. There was no obligation resting upon McMichael further than to execute a deed when called upon. The property belonged to French to all intents and purposes, and whether McMichael objected or not to the subsequent probate sale of the property, as part of the estate of one Nancy Spiller, did not in any manner affect the rights of French. Norris bought the property as belonging to said estate, and Bach bought it from Norris. After these transactions, French sued McMichael on his title bond, and cited both Bach and Norris as parties;

Held—That Bach had made himself liable, under the circumstances of the case, for the value of the rent of the property from the date of the service of the citation upon him in the suit of French against McMichael.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *E. D. Craig*, judge *pro tem.*, in the place of the district judge, recused. *S. D. Ellis* and *John W. Addison*, for plaintiff and appellee. *G. W. H. Marr*, *Wm. Duncan* and *L. E. Simonds*, for defendant and appellant.

TALIAFERRO, J. This is a petitory action to recover a house and lot lying in Amite City, and rent for its use and enjoyment during the alleged illegal possession and detention of the same by the defendants.

The answer specially denies ownership of the property in plaintiff, and avers title to the same in John M. Bach, derived from the succession of Nancy Spiller, through one Norris, the purchaser at the succession sale of the effects of Nancy Spiller, in July, 1863; the defendant Bach having purchased the property from Norris on the twenty-fourth of July, 1866. There was judgment for the plaintiff, decreeing the property to belong to the estate of Anson J. French, deceased, but refusing the plaintiff's demand for rents. The defendant Bach appealed. Buttman, the other defendant, was a mere nominal party. In this court the plaintiff prays that the judgment of the lower court be amended by allowing the rent claimed in her petition.

The plaintiff, we think, presents a perfect title, commencing with the patent to the land from the State of Louisiana to one George Richardson, dated nineteenth December, 1854, and followed by the successive conveyances of the property down to the completion of the title in Anson J. French, by deed executed under a judgment and decree of court, by the executrix of G. P. McMichael on the — day of July, 1871.

The defendant shows that he bought from Norris in July, 1866, and that Norris bought at the succession sale of Nancy Spiller a short time previous. There is no showing as to how or when Nancy Spiller ac-

Mrs. Louisa French, Executrix, v. Bach et al.

quired title to the property. The chain of title exhibited by the plaintiff is unbroken, and there is no evidence that Nancy Spiller acquired any right from either of the former owners. McMichael, the vendor of French, bought the property at the succession sale of Flynn, and executed a bond for title with Levi Spiller as surety. This bond, containing the usual stipulations of instruments of that kind, closes with this recital: "There is some probate proceedings to be had in regard to the succession of Mrs. Nancy Starns, wife of the said Levi Spiller, lately deceased, which the said Spiller promises to urge and perfect as soon as possible, with the free and full concurrence of said McMichael."

We find nothing in the record that explains this clause in the bond. An effort was made to introduce parol proof that McMichael never owned the property, and that Spiller did; and to the ruling of the court admitting witnesses to establish that statement, the plaintiff reserved several bills of exceptions. The ruling was clearly wrong, the testimony being exclusively parol, was inadmissible to destroy McMichael's title and establish title in Spiller, who had no vestige of title. It appears from a perusal of the record that Anson J. French, a resident of New Orleans, bought the property in question on the third of March, 1862, from G. P. McMichael, who, it has been seen, purchased it at a probate sale of the succession of Flynn. French paid McMichael one thousand dollars for the property, as recited in the bond. Under this act French took possession of the property and put repairs upon it to the value of eight hundred dollars. Soon afterwards French returned to New Orleans and remained there until after the end of the war in 1865. He left an agent in possession, who soon afterwards, upon the capture of New Orleans by the United States army, returned to the city, leaving the property with no one to take care of it. Upon the return of French after the war, he found the property in possession of the defendants—that on the twenty-eighth of July, 1863, it had been exposed to sale as belonging to the estate of Nancy Spiller, deceased, and that G. W. Norris had bought it for eight hundred dollars in Confederate money. French thereupon brought suit upon the bond against McMichael, and after the decease of the latter soon after, he obtained a judgment against his executrix, decreeing that the estate of McMichael, through his executrix, should perfect the title to the property in the estate of French, who also died pending these proceedings. To this suit Bach and Norris were both made parties. It is objected that the bond is not translativè of property. It is further objected by them that McMichael was present at the sale in July, 1863, and made no opposition to the sale, and therefore the plaintiff was estopped from afterwards claiming the property. We do not see the force of these objections. McMichael had sold the property to French

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in 1862, received one thousand dollars cash as the consideration for it, executed his bond for title, and French went into possession of it and expended eight hundred dollars upon it in repairs. There was no obligation resting upon McMichael further than to execute a deed when called upon. The property belonged to French to all intents and purposes, and whether McMichael objected to the sale or not, did not in any manner affect the rights of French.

We must regard the proceeding set up by the defendant as a probate sale of the property in dispute, in July, 1863, pretended to belong to the estate of Nancy Spiller as a mere nullity and without any legal effect. Nothing in the record, as before remarked, shows that the property ever was the property of Nancy Spiller. It is shown, moreover, that the price of adjudication was paid in Confederate money. The sale of the property of another is null, Civil Code, article —. This alleged sale, with all its surroundings, we cannot regard as having been made in good faith, and therefore that it is not covered by the immunity granted by article 149 of the constitution of this State. Norris having acquired no title, could transfer none to Bach, his vendee. Besides the bills of exceptions taken by the plaintiff to the admission of parol evidence to destroy McMichael's title, and to establish title in Spiller, which we have already considered, there are several other bills of exceptions by both parties in the record, but we do not deem it important in deciding this case to pass upon them.

It remains to consider the question of rent. The Civil Code, article 503, [495] declares that "he is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a *bona fide* possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the thing by the owner." It is shown that at the sale made in July, 1863, doubts were openly expressed among the persons present of the validity of the sale, on the ground that the property belonged to French. One or two bidders ceased bidding through fear of the title being defective. The sheriff who made the sale testified that he was impressed with the belief that Bach and Norris were in partnership in the purchase, and that Bach afterwards told him so. In March, 1866, French sued McMichael on his title bond, and cited both Bach and Norris as parties. After this judicial notice of French's title, Bach bought the property from Norris in July following for \$500, far below the price paid for it by French, besides the value of the improvements placed by him on it after his purchase. No depreciation in the value of the property is shown to have taken place between the time French bought it, and the date at which Bach purchased it from Norris. It is to be noticed, too,

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that when Bach was sued for the property he did not call Norris in warranty; nor did he on the trial testify against the charge made against him of bad faith. We think the defendant Bach has rendered himself liable for the value of the rent of the property from the date of service of the citation upon him in the suit of French against McMichael, to wit: ninth of April, 1866, at the rate of twenty dollars per month, that being the rate which Buttman was paying Bach in the year A. D. 1871, and had previously been paying him since July, 1869.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, in so far as it fails to award the plaintiff rent for the detention and use of the property in litigation, and reserves to the defendant Bach the right to recover for improvements, if any, put by him on the property, be annulled and reversed. It is now ordered that the plaintiff recover from the defendant, John M. Bach, rent for the property in controversy at the rate of twenty dollars per month from the ninth day of April, A. D. 1866, (eighteen hundred and sixty-six), until full possession of the property aforesaid be delivered to the plaintiff. It is further ordered, that as thus altered and amended, the judgment of the lower court be affirmed with costs.

No. 4751.

STATE OF LOUISIANA v. A. DE MONASTERIO.

26	734
52	710
26	734
117	790

26	734
123	841

Where there is no note of evidence in the record, this court is bound to presume that the judge *a quo* did his duty and had sufficient proof before him to justify his decree.

The complaint that the judgment is \$2 25 in excess of the allegations of the petition is not well founded. It is claimed as due the tax collector; and under section 75 of act 42 of acts of 1871, it should be recovered against the defendant.

There is error in the judgment of the court below in allowing the penalty of twenty-five per cent. from the fifteenth of December, 1871. It can only run from the fifteenth of December, 1872, because until then the defendant was not in default for the taxes of 1871.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, for plaintiff and appellee. *Fellows & Mills, Julien Michel*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment for taxes rendered against him for the year 1871, with a penalty of twenty-five per cent. from fifteenth December, 1871.

The plea of prematurity of the action having been overruled, the defendant answered to the merits without reserving the benefit of the exception, which must be regarded as abandoned. The numerous constitutional objections raised in this case were all disposed of in the case of the State v. Maginnis, 26 An., and several other decisions. We, therefore, decline to reopen the discussion thereof. The defendant, however, contends that judgment was rendered against him without proof of the indebtedness. There being no note of evidence in the

State of Louisiana v. DeMonasterio.

record, we are bound to presume that the judge did his duty and had sufficient proof before him to justify his decree.

The plaintiff complains that the judgment is \$2 25 in excess of the allegations of the petition. Such is not the fact. It is claimed as due the tax collector; and under section 75 of act No. 42 of acts of 1871, it should be recovered against the defendant. There is error, however, in the judgment in allowing the penalty of twenty-five per cent. from fifteenth December, 1871. It can only run from the fifteenth December, 1872, because until then the defendant was not in default for the taxes of 1871.

It is therefore ordered that the judgment herein be amended by allowing the penalty of twenty-five per cent. only from fifteenth December, 1872, and as amended that it be affirmed, appellee paying costs of appeal.

No. 3584.

GEORGE JACOBSHAGEN v. JOHN MOYLAN.

The plaintiff shows a just title to the property which he claims, and which was not divested by the pretended sale to the defendant, under a personal judgment of the City of Jefferson, now a part of New Orleans, v J. J. Scharge. The plaintiff was neither a party to the suit nor the sale, and the writ was not directed against him. Besides, the sale was made after the return day of the writ had expired, and the constable failed to return it and retain a copy as required by law.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. A. J. Lewis*, for plaintiff and appellee. *R. King Outler*, for defendant and appellant.

WYLY, J. The plaintiff, the owner of two lots of ground formerly in the City of Jefferson, now in the city of New Orleans, sues to annul the sale thereof by the constable, on the second of April, 1870, under a judgment of the Eighth Justice's Court, parish of Jefferson, for taxes in the suit of the City of Jefferson v. J. J. Scharge, and to recover said property from the defendant, the purchaser at said sale.

The court gave judgment for the plaintiff, and the defendant appeals.

The plaintiff shows a just title to the property, which was not divested by the pretended sale to the defendant, under the personal judgment of the City of Jefferson v. J. J. Scharge. The plaintiff was neither a party to the suit nor the sale, and the writ was not directed against him. Besides, the sale was made after the return day of the writ had expired, and the constable failed to return it and retain a copy as required by law. In this pretended forced sale there was no divestiture of title.

Judgment affirmed.

Rehearing refused.

No. 4340.

CITIZENS' BANK OF LOUISIANA v. J. STRAUSS.

The challenge of a juror by the plaintiff because he could not read or write the English language, was not a good ground of challenge, but as it is not contended that defendant has suffered by the ruling of the judge *a quo*, it cannot be declared a sufficient reason for reversing the judgment and verdict, and ordering a new trial.

While a party is before the court in the attitude of the *bona fide* holder of a note, he can legally object to any inquiry into the consideration of the note.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J.* Jury trial. *A. Pitot, Semmes & Mott*, for plaintiff and appellee. *W. W. King, A. Robert, John Ray*, for defendant and appellant.

HOWELL, J. This is a suit by a third holder against the maker of a promissory note, to which the defense is that the plaintiff is not the *bona fide* holder, but is suing for the benefit of the payer, against whom the defendant has a valid defense, to wit: want of legal consideration, in this, that defendant and the payer, S. Friedlander, as partners, purchased certain State warrants which were discovered to be forged and worthless, and by agreement the interest therein of said Friedlander was transferred to defendant, for which the note in suit, with others, was given. The case was tried before a jury, and after verdict and judgment in favor of plaintiff, and failure to obtain a new trial, the defendant appealed.

Two bills of exceptions were taken by the defendant, the first to the exclusion of a juror on the challenge of the plaintiff that he could not read or write the English language. This was not a good cause of challenge, but as it is not contended that defendant has suffered by the ruling of the judge, we can not declare it a sufficient reason for reversing the judgment and verdict and ordering a new trial.

The second bill was taken to the refusal of the judge to admit two documents, annexed to the bill, and which were offered to establish the illegal consideration of said note, and were ruled out on the ground that they were inadmissible until the defendant had first proved that the plaintiff was not the *bona fide* owner of the note, counsel for defendant contending that he could not be controlled in the order of introducing evidence, and declined to offer any other.

The rule invoked by defendant's counsel is correct, but it did not apply in this case, as the evidence offered is not admissible against a *bona fide* third holder, and while he is in that attitude before the court he can legally object to any inquiry into the consideration of the note.

We are of opinion that the rulings and judgment of the judge *a quo* were correct.

Judgment affirmed.

Rehearing refused.

Koechlin v. Lorber.

No. 4894.

FERDINAND KOECHLIN v. MRS. LOUISA THONTKE, wife of F. J. LORBER.

26	737
d123	241

The defendant, a married woman, is sued on three mortgage promissory notes drawn by her. It being in evidence that the defendant executed said mortgage on her separate property in favor of a firm of which her husband was a partner, to secure the payment of a certain sum of money which had always appeared in the books of the firm as the debt of her husband, who, to the knowledge of the firm and without their objection, was in the habit of drawing largely in excess of the amount he was authorized by the articles of partnership to withdraw annually, and which sum invested by her in the mortgaged property, sought to be seized, was given to her at a time when he was indebted to her in a greater amount for the restitution of paraphernal funds:

Held—That said mortgaged property can not be seized by the holders of the notes, on the ground that she can not bind herself for her husband's debts.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. J. L. Tissot, Lea, Finney & Miller*, for plaintiff and appellee. *Roselius, A. Voorhies and A. Philips*, for defendant and appellant.

HOWELL, J. Plaintiff, as holder of three notes for \$6000 each, secured by mortgage, caused executory process to issue and the mortgaged property to be seized. The defendant, a married woman, separate in property and maker of said notes, enjoined the writ on the ground that the debt, for which the notes and mortgage were executed, was the debt of her husband. The theory of the plaintiff, based on and supported by the act of mortgage which so declares and which he is seeking to enforce, is, that the defendant on the fifteenth November, 1865, borrowed \$18,000 from the firm of Leisy & Lorber, (Lorber being her husband) to pay for a house and lot. The notes and mortgage for this sum were given on the eighth June, 1870, to the plaintiff as a creditor of said firm, then and now in liquidation, upon a certificate of the judge of the Second District Court for the parish of Orleans, authorizing the defendant to execute a mortgage to secure the sum which she had borrowed. It is urged by plaintiff that this certificate is conclusive against the defendant, but there is evidence in the record, introduced by the plaintiff himself, that the sum in question was charged to the husband of defendant and continued from year to year by charging him with the interest thereon. This with the proof that the defendant's husband was, at the time, indebted to her in a much larger sum and that she used the money in buying a residence in her own name, makes it clear that the firm of Leisy & Lorber did not consider it a debt of the defendant. It was the restoring to defendant, by her husband, of her paraphernal funds received by him and which she invested in separate property. But it is contended by plaintiff, who is the subrogee of Leisy & Lorber, that Lorber could not legally and properly use a check of his firm, as was done, in paying his individual debt and that the firm or its creditor can pursue the individual creditor, so paid, and recover back the money. Conceding this to be a cor-

rect legal proposition (upon which we express no opinion), the dealings of the firm with the partner, in this instance, would take this case out of the operation of the rule. The partner was allowed, prior and subsequent to this transaction, to draw sums largely in excess of the amount, which by the articles of partnership he was authorized to withdraw annually, and the taking of this money and the use made of it was known to the other partner and still the same course of dealing and conduct was continued, and more than two years after such definite knowledge the partnership was renewed for a year. It was after all this that the defendant executed the mortgage to secure said sum of money, which appeared always in the books of the firm as the debt of her husband which was given to her at a time when he was indebted to her in a greater amount. Under these circumstances she can not, according to the law and jurisprudence of this State, be made to pay the debt.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant with costs in both courts.

No. 5007.

CHARLES DONNELLY v. ST. JOHN'S PROTESTANT EPISCOPAL CHURCH.

The objection to the testimony of a witness on the ground that it could not be introduced to establish a fact which could only be shown by the minutes themselves of a corporation, was not well taken. It has been determined that the neglect, incompetence, not to say dishonesty of a corporation in making up its minutes, can not exclude an interested third party from proving the truth by parol.

In this instance it is clear that the act of executing the note sued upon was ratified by the vestry, and it is unimportant whether, at the time of executing it, the persons who did so had a special authorization or not.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Rice & Whitaker*, for plaintiff and appellee. *James Brewer, Lacey & Butler*, for defendant and appellee.

TALIAFERRO, J. This suit is brought on a promissory note for \$800 dated tenth of August, 1872, payable six months after date to James McCloskey or order, with eight per cent. interest from date, being drawn by the senior warden and junior warden of the church, and purports to have been given "for material and labor furnished in the erection of said church." The plaintiff alleges that he is the owner and holder of this note, under the indorsement of the payee. He prays judgment for the amount of the note with recognition of the builder's privilege on the church building and the lots of ground upon which it stands, according to the provisions of law.

Payment of this note is resisted on the ground that William C. McCracken and George J. Vincent, the wardens who executed it, were

Donnelly v. St. John's Protestant Episcopal Church,

without power or authority to draw promissory notes, or in any manner to bind the defendant. The defendant further pleads failure and want of consideration, of which the plaintiff was notified before he became the owner and holder of the note. The plaintiff had judgment as prayed for and the defendant has appealed.

The plaintiff contends that the wardens who signed the notes were appointed a building committee by the vestry, and superintended the matter of the building it was determined by them to erect. That the building committee were charged solely with the power of contracting for the work, and had impliedly the right to execute the note to effect the object for which they were appointed. He refers to 19 An. 203, where it is said that "even without a specific power the agent can bind his principal by drawing bills and signing notes when it is necessary to raise funds to carry into effect the main object of the agency." The original minutes of the vestry of the St. John's Church, as contained in a bound book, are in evidence. The minutes show that a committee called "the building committee" was appointed, consisting, as it appears, of three persons, the two who signed the note and another who took but little concern in the business; the parties who signed the note were the active business men of the committee. A report was presented to the vestry giving a full account of the proceedings of the committee, and detailing the circumstances under which they had given the note for \$800. A difficulty had arisen with the builder who had undertaken the work, and in renewing the contract, or in making some modification of it, they found it necessary to execute the note. One of these committee men was on the stand as a witness. He swore that the report of the committee was adopted. His testimony was objected to on the ground that parol evidence could not be introduced to establish a fact which could only be shown by the minutes themselves, and a bill of exceptions was reserved.

We think the testimony was properly admitted. It has been determined that the neglect, incompetence, not to say dishonesty of a corporation in making up its minutes, can not exclude an interested third party from proving the truth by parol. 11 An. 649; 2 An. 939. In this case it would seem to appear incidentally by the minutes that the report was adopted. In some remarks made by the rector he said: "As the vestry has accepted the report, and as the resignations of the committee as wardens was embodied in the report, it was necessary to fill their vacancies." It seems clear that the act of executing the note was ratified by the vestry, and it is unimportant whether at the time of executing it they had a special authorization or not.

We think the decree of the lower court correct.

Judgment affirmed.

 Meritz et al. v. Marks et al.

No. 3395.

B. O. MERITZ et al. v. H. MARKS et al.

H. Scott, one of the defendants, was a non-resident and was not cited. The rule which he took to set aside the attachment on the supplemental petition was not an appearance subjecting him to the jurisdiction of the court on the merits. He was not represented by an attorney *ad hoc* appointed by the court, and the judgment maintaining the attachment of his property was erroneous.

The reconventional demand of the defendant Marks was not passed upon in the judgment. It was an irregularity.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. T. J. Cooley & E. Phillips*, for plaintiffs and appellees. *Race, Foster & E. T. Merrick*, for defendants and appellants.

WYLY, J. The defendants were sued as commercial partners for \$5913, and from the judgment condemning them to pay plaintiffs that sum they have appealed. The defendant, H. Scott, was a non-resident and was not cited. The rule which he took to set aside the attachment on the supplemental petition was not an appearance subjecting him to the jurisdiction of the court on the merits. 5 N. S. 427; 10 An. 334.

He was not represented by an attorney *ad hoc* appointed by the court, and the judgment maintaining the attachment of his property was erroneous. The reconventional demand of the defendant Marks was not passed upon in the judgment, which was an irregularity. 17 An 153. Justice requires the case to be remanded.

It is therefore ordered that the judgment herein be annulled, and that this case be remanded for new trial and to be proceeded with according to law, appellees paying costs of appeal.

Rehearing refused.

 No. 3549.

CANAL AND CARONDELET NAVIGATION COMPANY v. COMMISSIONERS OF FIRST DRAINAGE DISTRICT OF NEW ORLEANS.

It is impossible to consent to the proposition that, because private property may not be in use by the owner, it may be violently and illegally taken from him by another, with the view even of subserving the interest of said owners.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. H. D. Ogden*, for plaintiff and appellee. *Geo. S. Lacey*, City Attorney, and *H. H. Walsh*, assistant City Attorney, for defendants and appellants.

HOWELL, J. The city of New Orleans, as successor to the Commissioners of the First Drainage District, has appealed from a judgment in favor of the plaintiffs for the rent of two dredge boats, taken from them by virtue of an order of the Provost Marshal in 1862, and used by the said commissioners in their work of draining the city.

Canal and Carondelet Navigation Company v. Commissioners of First Drainage District.

It is contended on behalf of the city, that the boats were not in use at the time of the seizure; that they were an expense to the owners, whose interests were subserved by the seizure, and that the condition of the boats was improved by the repairs put on them by the commissioners, and hence no rent should be allowed.

We can not consent to the proposition that, because private property may not be in use by the owner, it may be violently and illegally taken from him by another, with the view even of subserving his interest. In this case we think the plaintiffs' property was improperly taken from them and used without their consent in making improvements which have inured to the benefit of the city, which has succeeded to the commissioners of the draining districts and that the value of the use of said property is shown to be what the lower court allowed plaintiffs. The repairs made by the commissioners to one of the tracts are more than offset by those necessary when the bonds were returned.

Judgment affirmed.

No. 5127.

JULES A. FLORAT, Tutor, v. ALFRED MARCHAND and M. F. MICHEL
in solido.

26	741
115	866

Michel, one of the defendants, in paying to Marchand, the holder of his negotiable note acquired before maturity, did, voluntarily, only what Marchand could have compelled him to do; and the plaintiff, who was defrauded of said note by his brokers, has no right to demand from him payment a second time. His recourse is against his unfaithful agents.

When one of two innocent persons must suffer, he whose act contributed to the loss must suffer rather than the other, who only discharged a legal obligation.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Fellows & Mills*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

LUDELING, C. J. The plaintiff sues the maker of a note which was indorsed in blank under the following state of facts: The plaintiff, Florat, deposited the note with Voisin & Livaudais. He agreed with Michel, the maker, to renew the note on condition that interest should be paid, and he authorized his agents, Voisin & Livaudais, to renew the note on the said condition.

The note was renewed, and afterwards it was pledged by Voisin & Livaudais to the Teutonia National Bank. Buck, in due course of business, then acquired the note and sold it to Marchand for a valuable consideration and before maturity. Florat then called upon Voisin & Livaudais for his note, and they failed to deliver it to him under subterfuges. Becoming alarmed, Florat went to the maker, Michel, and notified him not to pay the note, as it was lost or stolen. Whereupon

Florat, Tutor, v. Marchand and Michel.

Michel informed him that Marchand had informed him that he held the note. Florat then saw Marchand and Buck, who stated to him they had bought the note in due course of business for value and before maturity. On the day succeeding this interview, Michel, the debtor, gave the mortgaged property in payment of the note to Marchand.

Michel, in paying to Marchand, the holder of his negotiable note, did voluntarily only what Marchand could have compelled him to do, and the plaintiff has no right to demand from him payment a second time. His recourse is against his unfaithful agents. Where one of two innocent persons must suffer, he whose act contributed to the loss must suffer, rather than the other, who only discharged a legal obligation.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the defendant against the plaintiff, rejecting his demand with costs.

No. 3530.

JEAN SEGASSIE v. ANTOINE PIERNAS et al.

The surety on a release bond is responsible only for the value of movables, when not delivered according to the stipulations of the bond after judgment in favor of the plaintiff. It is only when the property is land that the law fixes responsibility for revenues.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. W. E. Murphy*, for plaintiff and appellant. *Rightor & McCollum*, for defendants and appellees.

HOWELL, J. This is a suit against the sureties on a release bond, and the principal question as stated by plaintiff's counsel is whether said sureties are liable for the fruits and revenues of movable property sequestered and released on bond.

Article 280, C. P., says: "The security thus given by the defendant, when the property consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff.

"Article 281. As regards landed property, this security is given to prevent the defendant, while in possession, from wasting the property, and for the faithful restitution of the fruits that he may have received since the demand, or of their value in the event of his being cast in the suit."

The bond required is to be for the amount fixed by the judge, as equal to the value of the property to be left in the possession of the defendant. Article 279.

Segassie v. Piernas et al.

From these provisions of the law we conclude that the surety on such bond is responsible only for the value of movables, when not delivered according to the stipulations of the bond after judgment in favor of the plaintiff.

It is only where the property is land that the law fixes the responsibility for revenues.

In this case the value of the property was established to be \$1025 when taken from the plaintiff in sequestration, and the portion returned to him is shown to have been only three hundred and thirty-five dollars, from depreciation and death, and it is not satisfactorily proven that the defendants in the sequestration took the care of the property which the law imposed on them.

It is therefore ordered that the judgment appealed from be set aside, and that plaintiffs recover of the legal representatives of the defendants in their virile proportion the sum of six hundred and ninety dollars, with five per cent. interest from first March, 1870, subject to a credit of seventy dollars deposited in court on twenty-eighth April, 1871. It is further ordered that defendants pay costs in both courts.

No. 3579.

JOHN SPALDING v. J. J. KREIDER et als.

This is a suit against the defendants, Mayor and Aldermen of the city of Jefferson, for damages resulting from the infliction of a wound on plaintiff by a mob of rioters composed, in part at least, of the police of the city of Jefferson officially appointed by defendants; Held—That as it is not alleged that defendants were present, aiding, abetting the so called rioters, or that they, or either of them, inflicted the wound, which is the basis of plaintiff's claim, there is no cause of action.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. F. N. Butler. W. H. Rogers*, for plaintiff and appellant. *Fellows & Mills*, for defendant and appellee.

MORGAN, J. Defendants were respectively, Mayor and Aldermen of the city of Jefferson. Acting in their official capacities they appointed, as is alleged, several persons on the police of that city.

There was a question whether the city of Jefferson was under the police jurisdiction of the Metropolitan Police. The Metropolitans attempted to assert their rights. It is alleged that these were opposed by a certain mob composed, in part at least, of the police of the city of Jefferson. A riot ensued. Plaintiff was on the Metropolitan side, and was wounded. He sues the defendants for \$50,000 damages. As it was not alleged that they were present aiding and abetting the so called rioters, or that they or either of them inflicted the wound which is the basis of plaintiff's claim, we agree with the district judge that the petition sets forth no cause of action.

Judgment affirmed.

No. 4759.

COMMERCIAL PRESS, SMITH & GOLDSMITH, Proprietors, v. CRESCENT CITY NATIONAL BANK, SCHULTZ, Warrantor.

Where it is proved that the indorser of a check indorsed it for no other purpose than to identify the person who presented it to the bank, and who was in the habit of collecting for the parties to whose order the check was drawn:

Held—That the responsibility of the indorser was as to the identity of the collector, but not as to his authority to sign the check for the parties to whose order it was given. The question is to be decided by taking into consideration in what manner and for what purpose he bound himself. For as he bound himself, so will he be bound.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Labatt & Aroni*, for plaintiffs and appellees. *Randolph, Singleton & Browne, Hudson & Fearn*, for defendant and appellant.

MORGAN, J. Smith & Goldsmith are the proprietors of the Commercial Press. A. J. Buck was their collector. As such he was authorized to collect their bills. He did not, however, hold their power of attorney. He was their servant therefor, and not their mandatory. On the sixth of April, 1872, he presented a bill for the compressing of cotton by the Commercial Press to A. K. Miller & Co. It is not denied that Buck was authorized to present the bill. The authority to receive payment thereof must be conceded. It would have been a thing done in the regular service for which he was employed.

Instead of paying in cash, they gave him a check on the Crescent City National Bank, payable to the order, not of Smith & Goldsmith, but to the order of the Commercial Press. Buck indorsed it "Smith & Goldsmith per A. J. Buck," and presented it to the bank for payment. The paying teller of the bank refused to pay the check. He says: "It was presented to me by one A. J. Buck, representing himself to be the collector of the Commercial Press. I did not know him, and I sent him back. I asked him to be identified, and he named me several well known houses, and asked me if I knew the house of Meeker, Knox & Co. I told him yes, and he went out. He came back and told me that Mr. Knox was out. I told him if he would have the check indorsed I would pay him. He asked me if I knew Mr. Schultz" (an employe of Meeker, Knox & Co.) "I told him yes. He had the check indorsed" (by Schultz) "and I paid him."

Buck absconded. It may be assumed that he took with him the entire proceeds of this check.

The plaintiffs sue the bank for the amount thereof, on the ground that the check was paid to a party not authorized to sign for them. The bank called Schultz in warranty, as indorser. Schultz answers, that he placed his name on the back of the check at the request of the proper officer of the bank, for the express and only purpose of identifying Buck as the collector of the Press. There was judgment in favor

of the plaintiff against the bank, and in favor of the bank against Schultz. Schultz alone has appealed.

It may be assumed that the case in 14 An. p. 481 (*Van Bibber v. the Bank of Louisiana*), correctly applied the law to the case before it. In that case it was decided that a bank is liable to the payees of a check made payable to their order when the check is paid on a forged indorsement made by the collector of the payees, who receives the check in payment of a bill of merchandise intrusted to him for collection by his employers. The Crescent City Bank practically concedes the applicability of this authority by not appealing from the judgment upon which it stands. We are not therefore called upon to examine its correctness. The question to determine is, not whether the bank is responsible to the plaintiffs, but whether Schultz is responsible to the bank?

In our opinion this question must be determined by answering another, viz: In what manner, and for what purpose did Schultz bind himself? For as he bound himself, so will he be bound. We can not find from the testimony that he intended any thing more than to identify Buck as the collector for the Commercial Press. We think this results from the testimony of Reed, the paying teller of the bank, which we have quoted; from the testimony of Marie, a clerk in the same house with Schultz, who says that he went to the bank with Buck to identify him, and to whom the teller said he was very sorry, but that he could not pay it upon his recognition, but added "get any member of the firm to come over, or any one with a power of attorney and I will pay the check;" and by the testimony of Schultz, who swears that he was only asked to identify Buck as the collector for the Press, and we think this is all he guaranteed. That Buck was the collector for the Press is not disputed. Reed, the paying teller of the bank himself, being asked, "If you had known him (Buck) as a collector of the Press for many years, would you have paid it" (the check?), answered, "Yes, as the rest have done." It is true, he says he would not have paid him the check unless he had been identified as the collector of the Press, with the power to indorse, but he also says that he does not know what he told Buck at the time, and that he wanted "somebody that would vouch for him or indorse for him as being the proper person to whom he could pay."

Under these circumstances, admitting the liability of the bank to the plaintiffs, we do not think there is any liability from Schultz to the bank.

It is therefore ordered adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, as to the appellant Schultz, and that there be judgment in his favor, with costs.

Richardson v. Smith et al.

No. 5044.

THOMAS A. J. RICHARDSON v. LEVIN P. SMITH et als. R. A. HUNTER,
Warrantor.

Execution having issued on a judgment obtained by R. A. Hunter in a former suit against Richardson, the plaintiff in this case, a tract of land belonging to said Richardson was sold, and Benjamin K. Hunter, the principal defendant in the present suit, became the purchaser. On a devolutive appeal taken by Richardson, the judgment thus obtained against him was annulled by this court on the ground that the citation was null, having issued in the parish of Rapides and been served upon Richardson in the parish of Sabine, the parish in which he resided and had his domicile. This action is brought by Richardson against said purchaser of the land at sheriff's sale in the suit of Robert A. Hunter against Richardson.

In so far as Benjamin K. Hunter is concerned, the proceedings in the case of Robert A. Hunter v Richardson are regular. There was a petition, citation, answer and judgment. Notice of seizure was given and notice to appoint appraisers, and an appointment of an appraiser by the defendant followed by a sale. Under these circumstances the sale, as to third persons, transferred the title to the property sold. The plaintiff's recourse, if he have any, is against Robert A. Hunter.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
Orsborn, J. J. F. Smith, W. A. Seay, for plaintiff and appellant.
E. J. Bowman, for defendants and appellees.

TALIAFERRO, J. In 1865 Robert A. Hunter brought suit in the parish of Rapides against the present plaintiff and obtained judgment, issued execution, and in April, 1869, a tract of land belonging to Richardson was sold and Benjamin K. Hunter, the principal defendant in this case, became the purchaser. From the judgment obtained against him by R. A. Hunter, Richardson took a devolutive appeal and the judgment was annulled by this court on the ground that the citation was null, having been issued in the parish of Rapides and served upon Richardson in the parish of Sabine, the parish in which he resided and had his domicile.

The present suit is brought by Richardson against Benjamin K. Hunter, who purchased the tract of land aforesaid at sheriff's sale, in the suit of R. A. Hunter v. T. H. J. Richardson. Judgment was rendered in the court below restoring the plaintiff to his rights in the land on reimbursing the defendant the sum paid by him for it. From this judgment the plaintiff appeals.

In so far as B. K. Hunter is concerned, the proceedings in the case of R. A. Hunter v. Richardson, are regular. There was a petition, citation, answer and judgment. Notice of seizure was given and notice to appoint appraisers, and an appointment of an appraiser by the defendant followed by a sale. We think, under these circumstances, that the sale, as to third persons, transferred the title to the property sold. The plaintiff's recourse, if he have any, is against R. A. Hunter.

It is therefore ordered that the judgment of the district court be annulled and reversed, and that there be judgment in favor of defendants, with costs in both courts.

Richardson v. Smith et al.

ON REHEARING.

TALIAFERRO, J. We are not inclined, after a review of this case, to change our first decree.

It is therefore ordered that the judgment rendered in this case remain undisturbed.

5056.

26	747
49	645

CITIZENS' BANK OF LOUISIANA v. H. RUTY. F. J. GALLAGHER, actual possessor. FRANCES J. JONES, wife, v. HENRY RUTY, husband. B. MARIONNEAUX, third opponent. Consolidated.

In this instance the application for an appeal was made in writing, and the time for the return thereof by the judge, was the day asked for by the appellants. If they erred, the error was their own, and they must bear the consequence thereof.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Cole, J. Samuel Matthews and Benjamin Deblioux*, for Frances J. Jones, plaintiff and appellant. *Barrow & Pope*, for Marionneaux, third opponent. *A. Pitot, G. S. Rousseau*, for Citizens' Bank.

MORGAN, J. The third opponent moves to dismiss this appeal as to Charles Lozano and Mrs. Frances Jones, on the ground that the appeal is made returnable to the May term of this court, and that the fault lies at their door. We have searched the record in vain to find any petition of appeal, or motion for appeal, or order of appeal in their favor. Consequently we can not notice them.

As to Mrs. E. M. Jones, executrix, she moved for a suspensive appeal upon her furnishing bond as required by law. The judgment is for \$528 50, with five per cent. interest from first January, 1872, to the twenty-sixth January, 1874, the date of the judgment. The interest amounted to \$81 40, and should have been added to the principal. 2 La. 86; 9 An. 310. The appeal bond, therefore, should have been for \$914 85. It is for \$792 25, and is therefore insufficient for a suspensive appeal. If not a suspensive appeal it is not any appeal, as the amount of the bond is not fixed by the judge.

It is therefore ordered, adjudged and decreed that the appeal be dismissed.

ON REHEARING.

MORGAN, J. As to Frances J. Jones, wife of Henry Rutty, and Charles Lozano, sheriff, the appeal must be dismissed. The petition of appeal was filed on the thirty-first January, 1874. They prayed that the appeal be returnable on the next return day for trial of appeals from the parish of Iberville. The next return day was the ninth February, 1874.

"The appellee must be cited to appear before the court of appeal at

its next term, if there be sufficient time for doing so after allowing the same delay which is granted to defendants in ordinary suits; and if there be no sufficient time to admit of the appellee having this delay, owing to the distance from his domicile to the place where the court of appeal is held, he shall be cited to appear before the same at the subsequent term." C. P. 583.

"The delay to be expressed in the citation consists of ten days, to be counted from the time the citation has been served, which are allowed to the defendant to comply with the demand of the petition, if the defendant reside in the place where the court is held, or within ten miles from such place. If the defendant reside at a greater distance the aforesaid delay shall be increased by one day for every ten miles that his residence is distant from the place of holding the court before which he is cited to appear. In counting the ten days neither the day when the citation has been served, nor the day when the delay expires, are included." C. P. 180.

The return day, fixed by law, for appeals from the parish of Iberville was the ninth February, 1874. The petition, as we have seen, was filed on the thirty-first January. The transcript was filed on the tenth February. The delays in which the appellee had to answer had not expired, even if he had been entitled to none other by reason of the distance from the place where the court, which rendered the decision, was held, to the place where the Supreme Court is held. The fault lies with the appellants, as they prayed that their appeal be made "returnable to the Supreme Court of Louisiana at the next regular return day for appeals from the Fifth Judicial District of Louisiana." This brings them within the exception provided for by the nineteenth section of the act of 1839, which provides that "no appeal to the Supreme Court shall be dismissed on account of any defect, error, or irregularity in the petition, or order of appeal, or in the certificate of the clerk or judge, or in the citation of appeal or service thereof, or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error, or irregularity is imputed to the appellant."

In this case the application for an appeal was made in writing and the time fixed for the return thereof by the judge was the day asked for by the appellants. If they erred, the error is their own. See the case of *Trimble v. Brichta*, 10 An. 778.

Under these circumstances their case is governed by the cases in 8 La. 220; 12 La. 480, 483.

It is therefore ordered, adjudged and decreed that the appeal of Mrs. Frances J. Jones, wife of Henry Rutty, and Charles Lozano, sheriff, be dismissed at their costs.

Bancker & Co. v. John and Hugh Brady.

No. 3670.

GEORGE W. BANNER & CO. v. JOHN AND HUGH BRADY, AND EVERETT LANE & CO. v. JOHN AND HUGH BRADY, consolidated.

Brady, a resident of Arkansas, proposed to Phelps & Co., residing in New Orleans, to ship them thirty bales of cotton, if they would furnish him fifteen hundred dollars in money and send him certain merchandise. The proposition was accepted and the contract was then formed. It was a sale of personal property perfected in Louisiana only by delivery. Before the delivery, either actually or constructively, the cotton was attached. Neither the cotton nor the bill of lading was delivered prior to the service under the attachment. Therefore the attachment must be maintained as good and valid.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. A. & W. Voorhies*, for G. W. Bancker & Co., plaintiffs and appellees. *Percy Roberts*, for Everett Lane & Co. *Semmes & Mott*, for John Phelps & Co., intervenors and appellants.

TALIAFERRO, J. This is a contest mainly between G. W. Bancker & Co. and Everett Lane & Co., attaching creditors, and John Phelps & Co., claiming the possession of the property attached, and a right to it as consignees according to the destination given to it by the owners, to repay advances made to them at their request, in goods and money. John Phelps & Co. intervened in both attachment suits, setting up their claims to the property attached. The material facts seem to be that in February, 1871, John Brady, one of the defendants, shipped from their residence in the State of Arkansas, to John Phelps & Co., thirty bales of cotton. This was preceded by a letter of advice, in which he requested them to send him by the return boat fifteen hundred dollars in money and some supplies and cotton bagging, etc. The request was complied with, and on the fourth of April following the steamer that brought the cotton arrived at the port of New Orleans. At six o'clock A. M. of the fifth of April, the cotton was attached. On the fourth, the day of the arrival of the steamer, application was made on board the boat by the intervenors for the bill of lading, and they were answered that it had been sent around to their counting room. It turned out, however, that Phelps & Co. did not receive the bill of lading until the next day, and after the attachment had been levied. The plaintiffs, Bancker & Co. and Everett Lane & Co., had judgments against the defendants. There was judgment in favor of the attaching creditors in each case, dismissing the intervention, and Phelps & Co., the intervenors, have appealed.

The principal inquiry seems to be, had the intervenors, the consignees, acquired possession of the cotton, and were their rights perfected before the attachment was levied? The intervenors do not claim a privilege. They contend that the delivery to the carrier of the bill of lading intended for them, was a delivery to them; that this delivery of the bill of lading, while the cotton was in Arkansas, where the com-

Banker & Co. v. John and Hugh Brady.

mon law prevails, vested in the consignees the ownership of the property, and in that condition it was brought within the limits of the State of Louisiana. and they maintain that the question is not one of privilege but of ownership, under the laws of Arkansas.

Considered as a sale, and we incline to think the agreement between the parties partakes of the character of a sale, the law of Louisiana would seem to govern. Brady, a resident of Arkansas, proposes to Phelps & Co., residing in New Orleans, to ship them thirty bales of cotton if they would furnish him fifteen hundred dollars in money and send him certain merchandise. The proposition was accepted and the contract was then formed. It was a sale of personal property perfected in Louisiana only by delivery. Before the delivery, either actually or constructively, the cotton was attached. Neither the cotton nor the bill of lading was delivered prior to the seizure under the attachment.

We think the case is with the attaching creditors, and that the decree of the lower court was properly rendered.

Judgment affirmed.

No. 5326.

STATE OF LOUISIANA ex rel. CITY OF NEW ORLEANS et al. v. THE
JUDGE OF THE SUPERIOR DISTRICT COURT, parish of Orleans, and
W. E. MURPHY.

It has been invariably held by this court that its jurisdiction can only attach by appeal properly taken, and that it has not a supervisory control over the inferior tribunals.

APPPLICATION for a writ of prohibition against the Judge of the Superior District Court, parish of Orleans, and W. E. Murphy. *George S. Lacey*, City Attorney, for relator. *Alfred Shaw*, for respondents.

HOWELL, J. The city of New Orleans and the Administrator of Finance allege that the defendant, W. E. Murphy, as transferee of the clerk of the Superior District Court, is attempting, by the process of injunction, to collect from the city of New Orleans the costs in a large number of tax suits, in violation of act No. 5 of 1870, which prohibits the issuance of any summary process against certain officers of the city, the object of which is to enforce the payment of money from the city; that the relators moved to dissolve the injunction on specified grounds and excepted to the jurisdiction of the court; that the motion and exception were overruled and the injunction allowed to remain in force, which will work an irreparable injury to the city, and they ask for a perpetual prohibition against the said judge and the said Murphy, restraining them from further proceeding in said case.

State ex rel. City of New Orleans et al. v. The Judge of the Superior District Court.

The defendants answer that the injunction issued in accordance with law and is not in violation of the act invoked, and they contend that as the injunction suit has not yet been tried and no judgment rendered from which an appeal has been or may be taken, the writ of prohibition does not lie.

This is the doctrine announced in the case of State ex rel. D'Meza et al. v. Judge of the Fourth District Court, 21 An. 123, which this court has followed since; but the counsel for the relators contends that the present application is not within the said doctrine; that the appellate jurisdiction of this court means its supervisory, as contradistinguished from its original jurisdiction; that appellate control is not confined to cases of appeal, but extends to appealable cases actually pending in the inferior courts, and that this court can exercise its power therein by other process than that of appeal.

This argument has been frequently addressed to this court and we have invariably held that our jurisdiction can only attach by appeal properly taken, and that we have not a supervisory control over the inferior tribunals.

It is therefore ordered that the application be refused with costs.

No. 3724.

PARKER & Co., for the use of, etc., v. J. P. HARRISON, SON & Co.

The defendants, merchants in New Orleans, were instructed to sell cotton, and send the money to care of W. W. Robertson, Glencoe, Mississippi, by the steamer Belle Lee. Defendants put the money in a package directed as advised, and sent it by one of their clerks to be put on board the Belle Lee, then at the wharf in New Orleans, and about to leave port. Within a short distance of the boat the clerk was knocked down, and robbed, while in an insensible condition, of the money and his gold watch. No recovery was ever made of the money:

Held—That, under the circumstances of the case, the defendants should sustain the loss, because the money was in their custody and under their control when the robbery occurred. It was out of the plaintiffs' power to prevent the act of the robber.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Labatt & Aroni*, for plaintiffs and appellees. *Semmes & Mott*, for defendants and appellants.

TALIAFERRO, J. This is a suit to make the defendants liable for the sum of \$635 36, proceeds of thirteen bales of cotton sold by them as factors of the plaintiffs, which proceeds, in cash, the defendants, in pursuance of instructions from their principals, did send to be delivered to them, but owing to a casualty happening on the way never came to hand. The plaintiffs had judgment for \$601 89. The defendants appealed.

The instructions to the merchants were to sell the cotton and send the money to care of W. W. Robertson, Glencoe, Mississippi, by the steamer

Barker & Co. v. Harrison, Son & Co.

Belle Lee. The merchants put the money in a package directed as advised, and sent it by one of their clerks to be put on board the Belle Lee, then at the wharf in New Orleans, and about to leave port. Within a short distance of the boat the clerk was knocked down, and robbed, while in an insensible condition, of the money and his gold watch. No recovery was ever made of the money. The question is, which party shall bear the loss?

Under the circumstances of this case we think the defendants should sustain the loss, because the money was in their custody and under their control when the robbery occurred. It was out of the plaintiffs' power to prevent the act of the robber. Greater caution on the part of the defendants might have prevented it. Had the money reached the boat and been put in charge of the clerk and under his safe keeping, in the usual manner in which remittances of the kind are made, then it would no longer have been in the possession and under the control of the defendants, and their risk would have been at an end. The plaintiffs' instructions to them to send the money by the Belle Lee would have been fully complied with.

This view of the case is sanctioned by the doctrine held by this court in the case of *Johnson v. Martin*, 11 An. 27. In that case the plaintiff sent a sum of money in bank notes inclosed in a letter directed to the defendant, which was deposited in his box in the postoffice. The letter was abstracted from the postoffice by a person who had formerly been in the employment of the defendant, but who had been previously discharged by him for dishonesty. The plaintiff sued to recover the amount thus lost from the defendant. Judge Lea, the organ of the court, said: "The plaintiff undertook to send a certain sum of money to the defendant. Until it is received, the latter can not be held accountable for it. At the time the robbery took place, it was no more under the defendant's control than that of the plaintiff, and though we are not prepared to say that under the peculiar circumstances of this case as disclosed by the evidence, the plaintiff himself was guilty of neglect, yet nothing in the record justifies the assumption that the defendant was bound to protect the plaintiff against acts of fraud or violence which might be perpetrated upon the postoffice by one who was not in his employ or under his control. We think the plaintiff is not entitled to claim from the defendant a reimbursement of the money of which he has been robbed by a third person, the act by which the loss was occasioned not being one which under the circumstances the defendant could reasonably have anticipated."

In the case at bar, we think the decree of the lower court in favor of the plaintiff was properly rendered.

Judgment affirmed.

State of Louisiana v. Widow J. C. de St. Romes.

No. 5147.

STATE OF LOUISIANA v. WIDOW J. C. DE ST. ROMES.

Authority to correct the errors of assessment complained of in this case is solely confided to the State Board of Assessors in the city of New Orleans and to the Auditor. It was therefore useless for the court *a qua* to hear testimony upon a point on which it was without authority to decide, to wit: the errors of the assessment, and the testimony offered was properly rejected. Besides, it was not alleged in the answer that the defendant sought to correct the errors complained of by making application to the State Board of Assessors according to law.

The constitutionality of that provision, making the decision of said board of assessors final as to "the valuations in the assessment rolls," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, for plaintiff and appellee. *Fellows & Mills, Victor de St. Romes, L. E. Simonds*, for defendant and appellant.

WYLY, J. The defendant resists the collection of State taxes on her property for the year 1871 on several grounds. The constitutional objections have all been decided adversely to her in the recent decisions of this court, and the discussion thereof will not be reopened. She also contends that the assessment of her property is erroneous, both in regard to the description and the valuation thereof; and she took a bill of exceptions to the ruling of the court in refusing to receive testimony going to show that she had in due time opposed the assessment as made, giving in her opposition the correct description and valuation of her property; that said opposition was disregarded; also that she offered to prove by witnesses the value of her property. The testimony was rejected on the ground that the court could not go behind or correct the assessment.

Authority to correct the errors complained of is solely confided to the State Board of Assessors in the city of New Orleans and the Auditor. Act No. 42 of the acts of 1871, sections 45 and 50. It was therefore useless for the court to hear testimony upon a point under the statute it was without authority to decide. The defendant also contends that there is no proof in the record to establish the demand of the plaintiff. There being no note of evidence in the record, the presumption is the judge below did his duty, and had sufficient proof before him to authorize his decree.

There is error, however, in the judgment allowing the penalty of twenty-five per cent. from fifteenth December, 1871, because until fifteenth December, 1872, the defendant did not become a delinquent taxpayer for the taxes of 1871.

It is therefore ordered that the judgment herein in favor of the plaintiff be amended by allowing the penalty of twenty-five per cent.

26	753
50	1363

26	753
108	152

26	753
109	567

26	753
125	60

State of Louisiana v. Widow J. C. de St. Rome.

to run only from fifteenth December, 1872, and as amended that it be affirmed, appellee paying costs of appeal.

ON REHEARING.

WYLY, J. It is not alleged in the answer that the defendant sought to correct the errors complained of in the assessment of her property, by making application to the State Board of Assessors, pursuant to sections 45 and 50 of act No. 42 of the acts of 1871. Furthermore, the constitutionality of that provision of said sections, making the decision of said board of assessors "final as to the valuations in said assessment rolls," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised in the case.

Rehearing refused.

No. 3863.

BATT & MICHEL v. THE CITY OF NEW ORLEANS et al.

Where plaintiffs alleged that the first adjudication of a certain market vested in them the title to collect the revenues of said market, and that when, in defiance of this adjudication, the controller of the city of New Orleans sold it anew, and received \$2500 more than their bid, this sum of \$2500 belonged to them :

Held—That by the terms of the sale, the city authorities had reserved the right to reject any or all bids. The second adjudication was a rejection of the first bid, and as this second adjudication was ratified by the council, it follows that the plaintiffs' claim for the difference between the first and second adjudications can not be maintained.

A PPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. E. Bermudez, C. F. Claiborne, A. L. Tissot*, for plaintiffs and appellees. *A. C. Lewis and B. R. Forman*, for defendants and appellants.

MORGAN, J. The city, on the fourteenth December, 1867, authorized the controller to adjudicate or cause to be adjudicated, to the highest bidder, the collection of the revenues of the public markets. The adjudication was to be made by public auction.

Plaintiffs allege that one of the markets was adjudicated to them for \$54,800, but that the controller disregarded the adjudication, and instructed his deputy to cry the market anew, which was done. At the second crying it was adjudicated to J. Grevenig for \$57,300. They claim from the city the difference between \$54,800, the amount of their bid, and \$57,300—that is to say, \$2500. They say that the first adjudication vested the title to collect the revenues of the market in them, and that when, in defiance of this adjudication, the controller sold it again, and received \$2500 more than their bid, this \$2500 belonged to them, and the district judge gave them a judgment for it. There is

Batt & Michel v. The City of New Orleans et al.

some conflict of testimony with regard to the facts connected with the adjudication. But this conflict we do not consider it material to state at length and analyze for the purpose of discovering whether there was an adjudication or not. It may be assumed that there was. But by the terms of the sale the city authorities reserved the right to reject any or all bids. The second adjudication was a rejection of the first bid, and as this second adjudication was ratified by the council, we think it follows that the plaintiffs' claim for the difference between the first and second adjudications can not be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of defendants with costs in both courts.

LIST OF CASES NOT REPORTED.

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1874.
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- No. 2983—Z. M. Pike v. J. H. Behan.
No. 4780—State of Louisiana v. Joseph Williams.
No. 4523—Rosette E. Storrs, Wife etc., v. E. Thompson et al.
No. 4813—State of Louisiana v. William H. Page.
No. 4827—State ex rel. Attorney General et al. v. E. G. Pintado.
No. 4664—Succession of Arthur McArthur.
No. 4919—Rhoda E. White v. Myra Clark Gaines.
No. *** —Charles Gayarre et al. v. Felix Heer et al.
No. 4680—State of Louisiana v. Edward Donnelly.
No. 3022—William A. Moore v. Adolph Minuet.
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No. 3104—Charles H. Davis v. B. L. Millaudon.
No. 3010—Henry Frellsen v. Daniel Fairex.
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No. 3025—St. Leon Destez v. Mrs. C. L. Walker.
No. 4786—State of Louisiana et al. v. Frame A. Woods et al.
No. 3073—Succession of Mrs. Evelina Green.
No. 2979—Mrs. Ann Madden v. E. Pendarvis, her husband, and P. B. Lee.
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No. 3091—Rosina Prague v. E. F. Walliche et al.
No. 4951—State ex rel. R. Taylor v. Judge of the Superior District Court.
No. 4921—State ex rel. John Larrieux v. Judge of the Superior District Court.
No. 4920—State ex rel. E. B. Benton et al. v. The Same.
No. 4521—William R. Mills v. R. R. Barrow.
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No. 3080—James Powers, Liquidating partner and Co. v. B. J. West.
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No. 4970—Octave Elfert v. Dranzin Triche et al.
No. 4984—State ex rel. F. Lacroix v. Judge of the Superior District Court.

- No. 4969—Alexander Lirette v. W. A. Shaffer.
- No. 5143—State ex rel. Hays & New, et al. v. Judge of the Superior District Court.
- No. 5121—C. Carrutz, Syndic, v. The Same.
- No. 5064—Charles Gilpin v. J. W. Walton, D. Palmer, and J. J. Cowan & Co., intervenors.
- No. 5086—Meyer & Kahn v. Joseph A. Rothschild et al.
- No. 5075—James Cotton v. Etienne Lebail and Wife.
- No. 4589—James A. Cobb v. Mrs. Louisa L. Knox and husband.
- No. 5447—James F. Hayden v. Henry Newell.
- No. 5096—R. R. Groves et al. v. Charles Carpenter, Executor.
- No. 5069—Succession of Harriet L. Vaughn.
- No. 5031—Numa Gaillard v. Bouligny & Esclapon.
- No. 5040—Tom Bynum, Administrator, v. Caroline Bynum.
- No. 5022—Frederick Fluck v. R. M. Kilpatrick, Mayor, et als.
- No. 5073—Pacard & Weil, Administrators, v. Mrs. Mary Riley et als.
- No. 4754—The State ex rel. C. McVea et als. v. J. Oscar Howell, Tax Collector.
- No. 5100—Succession of P. A. Kugler.
- No. 5060—State ex rel. Auditor Graham v. James R. Andrews et als.
- No. 5077—W. G. James v. J. E. Chase.
- No. 5027—Caspari & Dietrich v. J. M. D. Taylor and Wife,
- No. 5039—Eugene B. Biossat v. Mrs. Martha Martin, Tutrix.
- No. 5087—Police Jury parish of Iberville v. B. L. Lynch.
- No. 4857—Succession of John Berrigan.
- No. 4995—Francis O. Darby v. J. B. A. Claverie and Wife.
- No. 5036—State of Louisiana v. Augustus Sambola.
- No. 5089—Brannin, Summers & Co. v. R. K. Anderson.
- No. 3659—Caspar Lusse v. T. H. Patterson and J. P. Fleming.
- No. 3001—A. S. E. Roberts v. Fritz Huppenbauer.
- No. 5072—Catharine Norwood v. Gordian A. Smith.
- No. 5041— } Manuel J. de Lizardi, Liquidator, v. Hugh M. Keary et al.
 Consolida- } Ryan & White, Third Opponents.
 ted. } Ryan & White v. W. V. Keary, Administrator.
- No. 4996—Daniel Gillen v. Spicer Jones.
- No. 5190—State ex rel. Hays & New et al. v. Judge of the Superior District Court.
- No. 4927—State of Louisiana v. Richard Mass.
- No. 3115—Ellison, Creevy & Emley, Liquidators, v. E. W. Burbank.
- No. 4709—Henry Verdelet v. Francis Gallagher.
- No. 3976—James Gardiner v. S. Dezutter; John Daly, Third Opponent.
- No. 3041—Joseph Garrish v. George W. Train.
- No. 3303—William C. Sibley v. William Boyd & Co.
- No. 3277—D. W. Langton v. Gaston Bruslé.
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- No. 3114—Albert S. Chase v. W. R. Verlander.
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No. 2210—New Orleans Academy of Science v. Board of Administrators of the University of Louisiana.
No. 5125—W. L. Cushing v. Mrs. S. L. Harmanson et als.
No. 5020—Jules Verdier v. Philogene Coco.
No. 5037—Minerva M. Calvit v. Jos. Hoy & Co. et als.
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Consolid'd } J. & C. Spetere v. Sevario Cassar.
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No. 3033—Hypolite Nores v. G. S. West.
No. 3290—Inez Peyroux et als. v. Michel A. Peyroux et als.
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- No. 4873—Charles Weishaar v. Mrs. Anais Berens et als.
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- No. 3327—John Nisson, Master, et al. v. Richard Baker, Jr., et al.
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- No. 3394—E. B. Eberts & Co. v. R. F. Duran.
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No. 3555—Factors and Traders' Insurance Company v. W. J. Johnson.
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- No. 3578—P. O. Fazende v. Mr. and Mrs. Thomas Friend.
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 No. 5173—D. Landry v. Francois Victor.
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- No. 841—Marie E. L. J. Frere, Wife, etc., v. E. B. Mentz, Sheriff, et al.
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 No. 696—Demosthenes Nunez v. Thomas S. Winston.
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- No. 438—William B. Looney, use of L. G. Barron, v. D. H. Sheppard.
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 No. 449—M. S. Kinebrew, Administrator, v. W. C. Cooksey et als.
 No. 457—F. C. & T. D. Manning v. N. C. Glasson.
 No. 496—C. S. Herold. v. John Wright et al.
 No. 510—Taylor, Knapp & Co. v. W. J. Hancock.
 No. 437—Sallie T. Weaver v. W. S. Lewis, Sheriff, et al.
 No. 518—Succession of John H. Wisner.
 No. 499—John Caldwell v. William R. Cox.
 No. 505—John Hendrick, Sr., v. G. W. Kendall; Graham & Anderson, John Hendrick, Jr., Third Opponents.

No. 464—G. M. Croxton v. D. C. Morgan.

No. 446—G. W. C. Trezevant, Tutor, et al. v. John D. Holley.

No. 573—Rawlins & Murrell v. W. C. Maples et al.

No. 485—Parish of St. Charles v. Leon Sarpy.

No. 461—D. C. Morgan, Administrator, v. Mary E. Gibson, Administratrix.

No. 516—Angeline Rentz et als. v. Richard Cole.

No. 503—W. L. Cushing v. J. H. Beaird et al.

No. 494—F. Bercher v. City of Shreveport.

***—Michael & Hugh Palmer v. R. W. Turner, Judge of the Eighteenth Judicial District Court.

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ACTION.

1. The demand set up by the defendants in this case is, in its nature, independent from the action brought by the plaintiffs, and should therefore be considered as a principal, and not a reconventional demand. *J. O. Murphy & Co. v. McCarthy & Finnerty*, 38.
2. Where a contract has for its consideration an illegal currency reprobated by law, the plaintiff suing on that contract can not recover. *Jacob Donnelly v. L. L. Johnson*, 55.
3. The plaintiff being ostensibly the owner, under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner and as such entitled to both the property and its revenues, he must seek his remedy in a different direction.

B. K. Hunter v. M. J. Dunham et al.—T. H. J. Richardson, intervenor, 141.

4. A party can not, without showing an interest in the matter, be permitted to interfere with the final settlement of an estate between the heirs, and to pray that the public administrator of the parish be appointed to administer said estate and have an appraisal thereof made.

If the partition entered into between the heirs, and of which the plaintiff complains, is irregular and illegal, it is not to be corrected by taking out an administration.

Succession of Esther Poret—Opposition to Application for Administration, 157.

5. The plaintiff has instituted this suit to recover the amount of certain notes which he gave for having purchased at the succession sale, of one Sompeyrac the undivided half of a tract of land. He alleges that these notes were paid in error, having recently discovered that the said succession had no title to the undivided half of the tract of land so sold and adjudicated to him, and hence that he paid what he did not owe and for something which he did not acquire.

The plaintiff's action is premature, as no eviction or disturbance has occurred; and if it be considered an action of rescission, which it is in effect, it is defective, because plaintiff has been in possession several years, has made no tender of the property, or offer to return the same to the defendant, nor made an allegation that he has been disquieted, or has a just reason to fear disturbance or evic-

ACTION—Continued.

tion. The demand, as made, puts the plaintiff in the position of keeping the property and demanding the return of the price.

Louis Duplex v. Alexander Deblieux, Executor, 218.

6. Plaintiff, alleging to be the sheriff for the parish of Madison, enjoined defendant from acting or assuming to act as sheriff, from possessing or attempting to possess the books, papers, and archives of the said office, and from intruding or attempting to intrude himself therein. The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception is well taken and should have been maintained. The injunction must be dissolved.

Enos M. Cramer v. Alexander V. Brown, 272.

7. The possessory action is not the mode to test the right to enforce a mortgage or the regularity and validity of the proceedings in the execution of judgments. To recognize the action of plaintiff in this instance would give to every third possessor of mortgaged property the right to obtain and hold possession of such property against and in despite of the legal proceedings by the mortgage creditor to enforce his claim.

The law has provided the remedy for the protection of the rights of a third possessor, but it is not the possessory action.

T. A. Dahlgreen v. Stephen Duncan et als., 363.

8. The exception to the action must be sustained, where that action is a revocatory one and the petition itself discloses that there are, besides the defendants, other parties in interest who have not been made parties to the proceeding.

Abraham Vandine et als. v. Eherman & Lecanu et als., 388.

9. A claim for money expended and time employed for the organization and benefit of the Loan and Pledge Association, before its incorporation, can not be regarded and enforced as a debt of that institution.

It is impossible to imagine how the defendant, a juridical person, incurred a debt before its existence.

Besides, it is shown that \$1000 of plaintiff's claim was for cash advanced for the purpose of influencing legislation; that is, bribing the Legislature to pass the act incorporating the Loan and Pledge Association.

For the recovery of money thus expended, this court can give no relief. The guilty suitor must be left where his immorality has placed him.

A. Marchand v. The Loan and Pledge Association, 389.

ACTION—Continued.

10. In the order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property, there are two fatal defects:

First—The mortgageor is not made party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action.

Octave Reggio, Curator, v. Blanchin & Giraud, 532.

11. The defendants who are sued by certain heirs, as third possessors of an undivided half of the land described in the petition and sold by their father after the death of their mother, excepted to the right of the plaintiffs to recover until a settlement was made of the community that existed between the parents of the plaintiffs, showing a residuary interest in the succession of the deceased spouse. The exception is fatal, and the suit must be dismissed.

M. E. Daniel, Tutor, v. J. A. Ivy et als., 639.

12. There is no validity in the defense that, as the plaintiff who sues for the settlement of a commercial partnership, was not separated in property from her husband, the funds which she put in belonged to the community and she has no right of action.

Plaintiff has the right to sue for a settlement, if she was a partner, because this essential right exists in every partnership. Whether the capital which she put in belonged to her or not is a question that does not concern the defendant. Plaintiff's husband, having signed the contract of partnership, authorizing her to make it and having also authorized her to bring this suit, can never demand of the defendant the funds put in by his wife, whether they belonged to the community or not.

Mrs. T. J. Mangrum and husband v. Mrs. O. Norsworthy, Tutrix, 640.

SEE ATTACHMENT, No. 2—*Goodwell & Webb v. Minchew, 621.*

SEE BILLS AND PROMISSORY NOTES, No. 8—*Walton v. Young, 164.*

SEE CONTRACT, No. 10—*Field & Ponder v. Rogers et al., 574.*

SEE EVIDENCE, No. 30—*John Gordon v. Farenberg & Penn, 366.*

SEE INJUNCTION No. 19—*Mrs. Lewis v. Winston et als., 707.*

SEE JURISDICTION, No. 23—*Bowen v. Callaway, 619.*

SEE SUBROGATION, No. 1—*O. J. O'Hara v. N. Schwab et al., 78.*

SEE SEIZURES AND SALES, No. 8—*Johnson v. Dunbar, 188.*

SEE SUCCESSION, No. 2—*Netter v. Herman & Levy, 458.*

ADMINISTRATOR.

1. A party can not, without showing an interest in the matter, be permitted to interfere with the final settlement of an estate between the heirs, and to pray that the public administrator of the parish be appointed to administer said estate and have an appraisal thereof made.

ADMINISTRATOR—Continued.

If the partition entered into between the heirs, and of which the plaintiff complains, is irregular and illegal, it is not to be corrected by taking out an administration.

Succession of Esther Poret—Opposition to application for administration, 157.

2. The interference of the public administrator in this instance, on whose application defendant was removed from her trust as executrix, and himself appointed dative testamentary executor, was officious, and the judgment is erroneous. This is not a vacant succession; neither had the person appointed executrix failed to qualify, nor had she been removed, nor had any of the creditors asked for her removal.

Succession of W. O. Winn—O. K. Hawley, Public Administrator, v. M. E. Richards, Executrix, 162.

3. Margaret Moran, the surviving wife and natural tutrix of the child of the deceased, opposes a creditor's application for the administration, and claims it in her own right and as tutrix of her child. In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Therefore, the fact of deceased having married while a slave in Mississippi, did not prevent, notwithstanding the former wife still continued to exist, his lawfully marrying Margaret Morgan in Louisiana, where he resided after his emancipation. Besides, it is not in evidence that Margaret Morgan knew of his having another wife when he married her. *Succession of Henderson Randall, 163.*

4. A power of attorney given by the administratrix of an estate, to administer her own affairs can not be construed to extend to the administration of the estate of her deceased husband. The power of attorney granted to a person to manage the affairs of a succession, must be express.

The account not having been filed by the administratrix, nor by any one authorized by her, nothing therein contained can be considered as binding upon her or upon the estate which she represents.

The claim of the plaintiff, if not kept alive by the judgment rendered on the tableau, is long ago prescribed.

Succession of James W. Pipes, 203.

5. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section 9 of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

ADMINISTRATOR—Continued.

6. Where the plaintiff, individually and as administrator of a succession, sues to annul the sale of the succession property and other proceedings held in connection with the settlement of that succession, on the grounds that his attorney exceeded his authority therein; that the sale was null, no price being paid; and that all said mortuary proceedings were had without his knowledge or authorization, and were in fraud of his rights; and where said plaintiff instituted this suit more than six years after the sale which he seeks to annul:

Held—That under the circumstances presented in the record, this court can not think there should be much hesitancy in rejecting plaintiff's demand.

Wm. L. Cushing et als. v. S. L. Harmonson et als., 214.

7. Whatever may be the ordinary relations between the administrator of a succession and his attorney conducting the necessary judicial proceedings in the settlement of a succession according to the laws of this State, an administrator, residing in a parish distant from that where the succession is opened, who showed so little interest in, and attention to, his fiduciary trust, who allowed such a length of time to elapse before taking a single step of a personal nature, and who committed the whole succession to the sole management of his attorney, should not be heard with much favor when he asks a court of justice to undo what it has done at the request of his attorney. *Ibid.*
8. It was the duty of the administrator, as an officer of the court to know what proceedings were being had in the succession administered by him and to present himself, or have another attorney to represent him, in the place of the one who had died. To grant his demand would be a premium upon negligence in fiduciary agents and officers of courts. *Ibid.*
9. The prescription of one year to this action of nullity is properly invoked. The argument of the administrator that prescription only began to run when he discovered the alleged fraud practiced upon him, can not be of any avail, as he was bound in law to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care. *Ibid.*
10. By the judgment homologating the final account and tableau of her administration, the administratrix, plaintiff in this case, was discharged from her trust. Therefore, if that judgment be not utterly null, she, as administratrix, has no standing in court.
- The evidence in the record shows that the attorneys who filed the account were employed by her and that they were authorized to act in the premises.

ADMINISTRATOR—Continued.

Besides, more than twelve months had elapsed from the rendition of the judgment homologating the account, when this suit in nullity was instituted.

The administratrix can not be listened to when urging her own laches in having the account homologated before the account and tableau had been advertised ten days, in order to gain an advantage individually.

Succession of Antoine Decuir—Mrs. Josephine Decuir, Administratrix v. Leon Ferrier et als., 222.

11. The administrator of a succession only represents the creditors, and after the settlement of the debts, must turn over the estate to the heirs; but can not create or recognize any debt which will pass with the estate, and remain a binding, continuing debt against the heirs, because he is not appointed to represent them.

The provisions of the law seem to give to an illegitimate child the right of action for alimony only against the parent or his heirs. It is not a debt against the succession, which the creditors must allow, or which they have an interest in resisting, but a personal debt of the parent and of those who inherit his estate, and the heirs only take the residuum after the payment of the debts of the succession.

Therefore, the action for alimony, on the part of an illegitimate child can not properly be brought against the administrator of a succession. It seems by law to be owing by the heirs according to their virile share, and the obligation to pay it continues while it is necessary, or they are able to pay.

Louise Drouet v. Succession of L. F. Drouet, 323.

12. As the law has prescribed no specific form in which the appointments of administrators are to be made, if the certificate of appointment is signed by the judge, although it may not be in the usual form and manner in which such appointments are made, and letters issued, yet it must be considered as the act of the judge and effect must be given to it.

In this case the instrument declares that the application was made, that the party applying was duly appointed administrator and has fulfilled all the requirements of the law. This is to all intents and purposes the evidence of an appointment by the judge who signed the document.

Succession of Etienne Carlon, 329.

13. It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

Widow Anatole Villere v. Succession of Hugues Villere, 380.

14. It is clearly shown in this case that there has been a great dis-

ADMINISTRATOR—Continued.

crepancy between the amounts of revenues and expenditures in the administration of the minor's estate. The excess of the expenditures should fall upon the defendant. As he assumed the functions and discharged the duties belonging of right only to a tutor, and had exclusive control of the person of the minor, of his property and its revenues, so he must be held to the responsibilities of a tutor.

The court below erred in not overruling the exception to its jurisdiction in regard to annulling the mortgage granted by plaintiff to defendant. The defendant filed an account as administrator. That instrument has also the character of a tutorship account. The account shows a considerable balance against the minor, the present plaintiff, who, at the instance of the defendant, executed a mortgage on her property to secure the payment of that balance.

The administrator's account was homologated by order of the judge *a quo*. The mortgage has for its basis the account so homologated. That the judge *a quo* has jurisdiction of the suit to annul the amount and the order homologating it, there can be no doubt. The annulment of the account and judgment of homologation carries with it necessarily the annulment of the mortgage, because it expunges the amount of the assumed indebtedness for which the mortgage was given, thereby sweeping away the basis upon which it rested. *Emma J. Thacker v. Thomas Dunn*, 442.

15. The tutor states that he obtained the individual consent of persons who had composed a family meeting on a previous occasion, to make use of the capital of the minor's estate as he did. This is not justifiable, and, according to our law and jurisprudence, can not be allowed in favor of a tutor and surety.

Mrs. E. A. Deblanc v. F. Levasseur et al., 541.

16. The delinquent executor, who abandoned his trust and appropriated the funds confided to him, stands without equity before the court. He is in no position to complain of the penalties prescribed by law for not depositing the funds in bank.

Succession of Edmund Hogan. On opposition of Jeremiah Hogan to account filed by Peter Gallagher, Executor, 567.

17. Among the several grounds of opposition to a public administrator's account it was urged, that said public administrator had not been legally appointed. To this the administrator excepted on the ground that it was an attempt to remove him from office, which he maintained, could only be done by direct action. The judge *a quo* erred in dismissing the opposition. Admitting that in such a proceeding as was before the court, the administrator's capacity could not be questioned, still his exception should only

ADMINISTRATOR—Continued.

have been maintained in so far as it related to the denial of his capacity. The merits of the opposition on other points remained intact, and the opponent had a right to have them passed upon.

Succession of R. P. Epperson, 595.

18. The objection to the jurisdiction of the district court over the demand of the plaintiff can not be maintained, but, as the administrator of the estate of the deceased represents only the creditors of the succession, and has power only to pay the debts and turn the *residuum* over to the heirs, he can not represent the latter in a controversy to settle the rights of the respective partners in community, nor in a partition of the community property. A judgment against the administrator in this case would not bind the heirs of the deceased. The judge *a quo* did not err in dismissing the suit against the administrator.

Valcourt Veazy v. Onezime Trahan, Jr., Administrator, 606.

19. The plaintiffs, as heirs of the deceased wife of the defendant, alleging that he failed to open her succession, or cause an inventory thereof, consisting of half of the community property, to be made, but has administered the same as *negotiorum gestor* and permitted it to be wasted and dilapidated, obtained an *ex parte* order directing him to file an account of his administration and a notary public to make an inventory of said succession.

There is no authority for calling on a *negotiorum gestor*, in this manner, to render an account to the court in a fiduciary capacity, as an administrator of a succession; nor is the surviving husband, holding under the law as usufructuary, to be called on thus for an account of an administration. *Angeline Rents et als. v. Richard Cole*, 623.

20. As the administrator of an estate can not bind the estate he represents *ex contractu*, without the authority of the judge, the estate can not be bound by a breach thereof.

Hoss & Elder, Administrator v. George J. Jones, 659.

21. An administrator has no power to novate a debt due to the succession under his charge, without at least having been authorized to do so. *Ibid.*

22. Under no circumstances can the administrator of an estate take in payment of the rent of property a draft payable at the end of the lease, and thus give up the privilege which the estate he represents has on the growing crop. *Ibid.*

SEE COMPROMISE, No. 4—*Mahle et al. v. Elder et al.*, 681.

SEE SEIZURES AND SALES, No. 20—*Duckworth v. Payne et al.*, 683.

SEE HUSBAND AND WIFE, No. 2—*Anne Ford v. Kittridge*, 190.

SEE HUSBAND AND WIFE, 3, 4, 5, 6—*Hawley v. Crescent City Bank et als.*, 230.

SEE LEGATEES, No. 1—*Mrs. Evelyn M. May v. Ogden & Stansborough, Executors*, 239.

SEE APPEAL, No. 20—*State ex rel. Rasberry v. parish Judge of the parish of Bossier*, 385.

SEE INTERVENOR, No. 6—*Webb v. Keller*, 596.

ADMINISTRATOR (PUBLIC.)

1. The Public Administrator, in this instance, is only entitled to two and a half per cent. commissions on the collections he made. He was acting in the capacity of an ordinary administrator under appointment of the court. His pretensions to five per cent. commissions on the whole appraised value of the estate are extravagant. The preceding administrators, who were in office four years, and who had virtually closed the administration, were allowed two and a half per cent. on the amount of the inventory. For the brief space of his administration, during which there were but a few simple acts to be performed, his charge of five per cent. commissions on the whole value of the estate is totally unwarranted by law. In creating the office of public administrator, the Legislature can not have intended to sanction the spoliation of successions.

Succession of E. Hart—Opposition of Cornelia Hart, Tutrix, 662.

- 2 In this case the judgment of the court *a qua* appointing the public administrator to administer the succession was erroneous. It was not a vacant succession. There were no debts against the estate—the heirs were represented according to law and were claiming to be put in possession. Under this state of facts his functions were not required.

Succession of Mary A. Gee, 666.

ADJUDICATION.

SEE OBLIGATIONS, No. 9—*Batt & Michel v. City of New Orleans, 754.*

AGENT AND PRINCIPAL.

1. A power of attorney given by the administratrix of an estate, to administer her own affairs can not be construed to extend to the administration of the estate of her deceased husband. The power of attorney granted to a person to manage the affairs of a succession, must be express. *Succession of Pipes, 203.*
2. The evidence in this case shows that the plantation which is the object of this suit was purchased in his name, for the benefit of plaintiff, by defendant, who was the agent and attorney at law of plaintiff's mother and tutrix, then absent from the State, and that he expected the plaintiff to have sufficient funds out of the succession of her grandfather to pay the note given by him for the price at the maturity thereof.

The question is: Having failed to collect for the minor funds sufficient to pay said note at maturity, was defendant justified in refusing to transfer the title to plaintiff, when she returned to the State, was emancipated by the court, and tendered to him the note which he had executed for the land, and \$500, the cash he had paid on that note, with interest on said payment?

AGENT AND PRINCIPAL—Continued.

Held—That, under such circumstances, he was not justified in refusing to transfer the title to the plaintiff.

Whether the defendant had, or had not, special authority from the court to buy the land for the minor is immaterial. He did buy for her, he agreed to convey it to her when necessary, and this proposition had not been withdrawn when she accepted it and made the tender.

As the defendant has enjoyed the use of this land for a long time, he is not entitled to interest on the amount of the price paid by him, nor is plaintiff bound to refund the amount of the taxes paid by defendant.

The court *a qua* erred in not allowing the reconventional demand of the defendant for professional services and for money advanced to the natural tutrix of plaintiff for her benefit.

Mollie E. Livingston v. D. C. Morgan, 646.

3. Where it appears that the husband of the defendant, who is separate in property from her, was authorized to employ servants for the hotel kept by the defendant and in which she resides, to settle with them and to pay their wages, and that he had general superintendence and sole control and management of the hotel;

Held—That this authority included the power to make a note for the wages due to servants employed in the hotel.

Even without specific powers the agent can bind the principal by drawing bills and signing notes where it is necessary to raise funds to carry into effect the main object of the agency. *A fortiori*, would he have authority to acknowledge a debt due to the employe of a hotel whom he was authorized to employ and to settle with.

The instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, but not of one year, would be applicable.

It being proved that the defendant resided at the hotel during the term the services were rendered by the plaintiff, it must be presumed that she was informed of what her agent did in regard to the settlements with the servants in her employ, and that she ratified his acts, as it is not shown that she ever repudiated them—the plaintiff continuing in her service after the note was given.

Peter James v. Mrs. M. J. Lewis and Husband, 664.

4. The failure of the principal to repudiate immediately, or within a reasonable time, the acts of his agent when informed of them, must be construed into an acquiescence.

Kehlor, Updike & Co. v. Kemble, Hastings & Co., 713.

SEE BILLS AND PROMISSORY NOTES, No. 5—*Charles Zapatha v. Olfreo and Bougere*, 87.

SEE CONTRACT, No. 9—*Stagg v. Belden*, 455.

ALIMONY.

SEE ADMINISTRATOR, No. 11—*Drouet v. Drouet*, 323.

APPEAL.

1. Where the judge of the Superior District Court refused a suspensive appeal from an order rendered by him in a certain suit pending in that court, wherein the relators are defendants—which order was—that their books be produced in court and experts be appointed to examine them on or before the trial of the case ;

Held—That from an examination of the record presented, this court is inclined to think that the appeal should have been granted.

State ex rel. Benton et al. v. Judge of the Superior District Court, 57.

2. Where the grounds to dismiss the appeal are, that the right to office is involved, and in such cases, when an appeal is taken, it should be made returnable in ten days after the rendition of the judgment appealed from in conformity with law ; that the judgment of the lower court in this case was signed September 20, 1873 ; that on the twenty-second of the same month the appellants by motion in open court applied for and obtained an appeal returnable on the first Monday of November, 1873 ;

Held—That the motion to dismiss the appeal must prevail.

State of Louisiana ex rel. Slack et al. v. F. A. Hall, 58.

3. The policy of the law in requiring appeals in cases involving the right to office to be made returnable in ten days after rendition of judgment, is obviously to have such cases determined speedily and with the least possible delay. This requirement of the law must therefore be construed strictly.

The illegality of the return is not obviated from the fact that the appellate court was not in session when the judgment was rendered and not to convene again until the first Monday of November.

Had the appeal been made returnable within ten days as the law requires, the appellant would not have lost his right of being heard on appeal as soon thereafter as the court should be in session. *Ibid.*

4. Where an application is made for the revision of a judgment for five hundred dollars and costs of suit, this court, of its own motion must dismiss the appeal on account of a want of jurisdiction *ratione materiae*.

R. C. Oglesby v. William B. Helm, 61.

5. In order to determine the jurisdiction of the court, the amount in dispute at the time the suit was filed, alone must be considered. Costs, subsequently accruing, can not be estimated so as to give this court jurisdiction. *Ibid.*

6. An action not revisable by an appeal is not revisable in this court by an action of nullity, or by an appeal from the judgment in the action of nullity. *Ibid.*

APPEAL—Continued.

7. This court not having jurisdiction of a judgment because the matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes prescribed by the Code of Practice. *Ibid.*

8. The appeal in this case must be dismissed, because the thing demanded is a sum of money less than five hundred dollars, although the appellant contends that the court has jurisdiction, on the ground that the demand grows out of a contract between the plaintiff and the city of New Orleans for grading and shelling a long street, costing several thousand dollars, and that the validity of the contract is involved.

The obligation of the defendant sought to be enforced involves only the sum of two hundred and sixty-seven dollars and seventy-seven cents. To this extent only the contract in question concerns him. The inquiry here is not as to the obligations of other front proprietors. *James J. O'Hara v. Succession of John Davidson*, 76.

9. The question in this case is whether the judge *a quo* had the right to refuse a suspensive appeal.

This is not the case of a contest as to which of several applicants shall be appointed administrator of a succession, where the necessity of an administration is not questioned, and where the appointment under the law takes effect notwithstanding an appeal.

The question is whether there was any necessity for an administration at all. From a judgment deciding this against them, the heirs had a right to a suspensive appeal to this court.

State ex rel. Heirs of Gee v. The Parish Judge of Claiborne, 122.

10. It is well settled that want of citation of appeal will be cured where the appellee appears and contests the case on any other ground. *Hefner v. Hesse & Verges*, 148.

11. A rule by relator was taken in the court *a qua* to show cause why her opposition to the homologation of the report of certain experts should not be maintained, and an order of sale be rescinded. On trial, the opposition was dismissed, and the application to rescind the sale discharged. The judge *a quo* refused to grant an appeal. Among other reasons for it he alleged that these orders are merely interlocutory, and can not operate an irreparable injury. This is an error. The facts are such as to entitle relator to an appeal.

State ex rel. Mary B. Caldwell v. The Judge of the Fourth District Court, Parish of Orleans, 161.

12. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

Patrick Halpin v. John L. Barringer—W. Woelper, Garnishee, 170.

APPEAL—Continued.

13. It is not necessary that the appellant should sign the appeal bond; but an appeal granted to Elizabeth McQueen and others can not be perfected by an appeal bond signed by M. McQueen, as principal, and C. B. Austin, as security. The surety of M. McQueen can not be regarded as the surety of Elizabeth McQueen.

Succession of William Richardson—Opposition of Elizabeth McQueen et al., 187.

14. When the judge fixed no amount for the appeal bond and a suspensive appeal was granted on giving bond conditioned according to law, the appeal will be dismissed. The amount of the appeal bond is not sufficient for a suspensive appeal, and it will not do for a devolutive one, because it was not for an amount fixed by the judge. *Bridget Bockel et al. v. Joseph Rudman et al.*, 208.

15. Where the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court, the motion to dismiss the appeal must prevail.

O. E. Girardey & Co. v. The City of New Orleans, 291.

16. The order of the court *a qua* dissolving the injunction in this case is one which, in the opinion of this court, might work an irreparable injury to the relator; therefore the relator had a right to appeal from it. The judge below erred in dissolving the injunction.

State of Louisiana ex rel. John T. Hayes v. The City of New Orleans, 304.

17. All the objections urged in this case as grounds for dismissing the appeal, except the last, were waived by failing to file the motion within three days after the return day.

As to the last objection referred to—which is that all the parties interested in the judgment have not been made parties to the appeal, it is untenable. There is in the record an order for an appeal granted on motion in open court, and the bond is executed in favor of the clerk. All the parties who have not appealed are appellees.

Richard Francis v. William Lavine et als., 311.

18. The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute his appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment; nor is it impossible to declare the judgment null and inoperative as to the appellants, and leave it undisturbed as to the others against whom it is rendered.

One judgment debtor has the right to be relieved from an erroneous

APPEAL—Continued.

judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The exception to the jurisdiction of the court below, *ratione materiae*, should have been sustained, the interest of the plaintiff being less than five hundred dollars. Plaintiff has no greater right to annul or injoin in this proceeding the bonds issued by the police jury of the parish of Concordia, than if he were resisting the payment of his tax levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

George L. Walton v. Police Jury, parish of Concordia et als., 355.

19. Where the parties who claimed liens under the law granting a privilege to mechanics being cited, to enable them to establish their claims and receive their *pro rata* of the amount deposited, appeared and contested with the plaintiff, it matters not whether some of the parties received a judgment for the whole of their claims or not. An appeal will lie from the judgment.

William O'Hern v. A. B. Gouldy et als., 371.

20. Where the issue made by a rule to show cause was, whether a judgment rendered against the succession administered by the relator should be paid and satisfied out of the individual estate of the administrator, on the ground that the administrator refused or neglected to pay it out of the funds of the estate, and that he failed or refused to file an account of his administration; and where the decision was that execution issue against the individual property of the administrator, to be seized and sold to satisfy the judgment against the succession, it is clear that the right of appeal lies from such a decision.

State of Louisiana ex rel. L. C. Basberry v. Parish Judge of the Parish of Bossier, 385.

21. The motion to dismiss must be overruled. The bond being for the amount fixed by the judge *a quo* is therefore sufficient to maintain the appeal.

John Hughes and Wife v. Charles F. Caruthers. Mrs. Ann M. Hennen, Third Opponent, 530.

22. Judgment having been rendered against both defendants in this suit by an heir against her tutor, who was also administrator, and his surety on the two bonds, the surety alone appealed. The tutor and administrator being an appellee, the prayer of the plaintiff, the other appellee, to amend the judgment against him, can not be entertained.

The question, raised on the merits, that the plaintiff, being a mar-

APPEAL—Continued.

ried woman, was not authorized by her husband to bring this suit, must be considered as settled between the parties by the decision on the motion to dismiss the appeal, which was made on the ground of want of proper parties—the husband not having been joined in the petition of appeal. The suit having been commenced by the wife, assisted by her husband, citation of appeal to her was sufficient. *Mrs. A. E. Deblanc v. F. Levasseur et al.*, 541.

23. The surety on the injunction bond being condemned to pay no damages, has manifestly no interest in the appeal which the plaintiff has taken, the court *a qua* having dismissed the suit on the exception of no cause of action, and the injunction being dissolved without damages, reserving to defendant the right to claim the same on a separate action on the bond.

The decision of this court in this appeal can in no manner affect the surety on the injunction bond, wherefore it would be a vain thing to make him a party to the appeal.

Caroline Richardson, wife of A. Piseros, v. E. R. Chevalley et als., 551.

24. The court below having made an order, in a proceeding to which the defendant was not a party, appointing the plaintiff provisional administrator of the succession of defendant's father in the place of said defendant, the executrix thereof, and putting him in possession of the property thereto belonging, the defendant took a rule against the plaintiff to set aside this interlocutory order on the ground that it was improvidently granted and not warranted by law. The plaintiff appeals from the setting aside of the order. The plaintiff can suffer no irreparable injury by the decree from which he has appealed. It simply revokes an order disturbing the defendant's possession of the property of her father's estate and permits her to continue to discharge the duties of executrix of the succession until the suit is tried, and it is determined whether she shall be removed from office or not. Whether her administration pending the suit will be beneficial or injurious, is a question which concerns the heirs and creditors, but it is a matter in which the public administrator has no interest. The appeal must be dismissed.

Succession of John K. Elgee. E. T. Parker, Public Administrator v. Bessie Elgee Gausson, Executrix, 553.

25. The defendant's petition of appeal prays that E. Newman & Co., be cited through Raoul Jumonville, liquidator, to answer the appeal, and accordingly citation was only served on Jumonville. E. Newman was not cited, although he had an interest in sustaining the judgment. The fault is imputable to the appellant. Of the court's own motion the appeal is dismissed.

E. Newman & Co. v. L. H. Levy, 573.

APPEAL—Continued.

26. There are not sufficient causes to dismiss the appeal on the grounds: That the certificate of the clerk is too comprehensive; that the appellant proceeded by rule to set aside the order dissolving the injunction before petition and order of appeal; and that the suit is still pending on the merits in the district court.

Even if the certificate of the clerk could be regarded as defective, because it embraced more than is necessary, that is no cause for the dismissal of an appeal.

It is manifest that the injunction in this case should not have been set aside on bond, as the plaintiff in injunction had alleged and sworn that the sale would work him an irreparable injury. The order setting aside the injunction must be annulled.

Arthur Simon v. Charles H. Walker and Sheriff, 603.

27. As to the sufficiency of the proof to sustain the charge of murder against the defendant, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

State of Louisiana v. Ozeme Fruge, 604.

28. Plaintiff's have failed to allege or show the amount of their interest as taxpayers in the matters involved in this suit, and hence the motion to dismiss this appeal for want of jurisdiction must prevail.

The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars does not show such interest as to give this court jurisdiction.

T. S. Dugan et al. v. Police Jury of the Parish of St. Charles et als., 673.

29. In this instance the application for an appeal was made in writing, and the time for the return thereof by the judge, was the day asked for by the appellants. If they erred, the error was their own, and they must bear the consequence thereof.

Citizens' Bank of Louisiana v. H. Rutty, 747.

SEE BONDS, No. 1—*State ex rel. Taylor v. Judge of the Superior District Court*, 65.

SEE OFFICES AND OFFICERS, No. 6—*Cramer v. Brown*, 272.

SEE PLEADINGS, No. 5—*Whetstone v. Rawlins*, 474.

SEE INJUNCTION, No 17—*State ex rel. Van Norden v. Judge of the Superior District Court*, 550.

ATTORNEY GENERAL.

SEE OFFICES AND OFFICERS, No. 4—*State of Louisiana v. George Russell*, 68.

ATTORNEY'S FEES.

SEE SEIZURES AND SALES, No. 15—*Socha v. Renaldo*, 500.

ATTACHMENT.

1. In the jurisprudence of this State the writ of attachment is considered a harsh remedy, and should not be granted, except where the creditor is clearly entitled to it. The evidence in this case does not make it clear that the defendant was about to convert his property into money or evidences of debt with the intent to place it beyond the reach of his creditors, as alleged, and as the law prescribes.
Bussey & Co. v. J. A. Rothschilds, 258.

2. The attachment in this case was improperly dissolved. The defendant having been sued on an undisputed debt, transferred his plantation upon which he was living, in the fall, before gathering a growing crop, and just as a judgment by default was about to be made final. He transferred it in part payment of a debt due another creditor, and though he received cash enough to discharge the debt sued upon, he failed and refused to apply any part of the money to the payment of the debt; and shortly after this transfer he removed to Texas. These acts authorize the belief that he transferred his property with a fraudulent intent, and justified the attachment.
Goodwell & Webb v. A. F. Minchew, 621.

3. The plaintiffs purchased in January, 1872, from one Robert Stothard, a certain section of land with the improvements thereon. Joseph Stothard was employed to hold possession for plaintiffs. During the same month the place and improvements were attached at the suit of Laura Stevens against said Robert Stothard and taken possession of by the sheriff who appointed Laura Stevens herself as keeper, and she employed Abercrombie, the defendant to take charge of the place as her agent. The seizure was subsequently released by order of Mrs. Stevens, the plaintiff in the attachment suit. The sheriff made his return accordingly, and gave an order to the custodian under him to cease his duties as such. One of the plaintiffs thereupon demanded possession of the defendant who refused to comply with the demand. The defendant being in possession *pro hac vice* as keeper under the sheriff, it was clearly out of his power to acquire a possession adverse to the plaintiffs' rights.

Title does not come into view when the question is purely one involving the right of possession.

Chaffee, Shea & Loye v. George B. Abercrombie, 685.

4. When there is no garnishment the actual seizure of the property is alone the basis of the attachment and jurisdiction of the court. It is the duty of the sheriff to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper.

J. H. Scott v. D. C. Davis et al.—F. B. Davis, Garnishee, 688.

ATTACHMENT—Continued.

5. H. Scott, one of the defendants, was a non-resident and was not cited. The rule which he took to set aside the attachment on the supplemental petition was not an appearance subjecting him to the jurisdiction of the court on the merits. He was not represented by an attorney *ad hoc* appointed by the court, and the judgment maintaining the attachment of his property was erroneous. The reconventional demand of the defendant Marks was not passed upon in the judgment. It was an irregularity.

B. O. Meritz et al. v. H. Marks et al., 740.

6. Brady, a resident of Arkansas, proposed to Phelps & Co., residing in New Orleans, to ship them thirty bales of cotton, if they would furnish him fifteen hundred dollars in money and send him certain merchandise. The proposition was accepted and the contract was then formed. It was a sale of personal property perfected in Louisiana only by delivery. Before the delivery, either actually or constructively, the cotton was attached. Neither the cotton nor the bill of lading was delivered prior to the service under the attachment. Therefore the attachment must be maintained as good and valid.

George W. Bancker & Co. v. John and Hugh Brady, and Everett Lane & Co. v. John and Hugh Brady, consolidated, 749.

SEE SEIZURES AND SALES, No. 4, 5—*Joseph Hoy & Co. v. Eaton & Barstow and Sheriff*, 169.

SEE HUSBAND AND WIFE, No. 16—*Wilson v. Chaleron et al.* 641.

SEE BONDS, No. 14—*Levin et als. v. Lacey et als.*, 270.

SEE PRACTICE, No. 10—*Poutz v. Reggio*, 305.

AUCTIONEER.

1. An auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

Myra F. Minor v. James L. Barker, Auctioneer, et als., 160.

2. This is an action against an auctioneer and his surety on his bond for duties on sales.

The surety should hardly be heard to make such a defense as the one set up in this case—which is, that the bond was not legal at the time of the defalcation alleged against the principal, because said principal had not taken out the license and the oath required by law.

Considering that the principal is proved to have acted as auctioneer and made repeated settlements under oath, as required by law, with the Auditor, showing the amount claimed to be due the State,

AUCTIONEER—Continued.

it is to be presumed, as against the surety, that he complied in other respects with the law.

The prescription of one and two years, based on the act of 1869, p. 45, second section, does not apply. This statute is not understood to release sureties from any liability existing at the date of its passage. *State of Louisiana v. John O. Blohm et als.*, 538.

AUDITOR OF STATE.

SEE EVIDENCE, No. 25—*State v. Succession of Masters*, 268.

BANQUETTES.

1. According to the twenty-fourth section of the present charter of the city of New Orleans, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said petitioners by a written petition addressed to the Council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into in accordance with said petition, to make the banquettes which they were legally bound to make.
2. The plaintiff's contract with the city of New Orleans did not embrace the work for which payment is sought in this suit, and the defendant was making the improvement himself with the assent of the city authorities, when he was interfered with by the plaintiff officiously completing the work defendant had begun, in despite of his opposition.

There may be hardship involved in the result which enriches the proprietor at the plaintiff's expense, but, however it may or should recommend itself to the conscience of the proprietor, it is a hardship of the plaintiff's own seeking, which can not be judicially remedied. *James J. O'Hara v. John Krantz*, 504.

The evidence showing that the work was well done and that the price charged was reasonable, it would be repugnant to every principle of law and equity, to permit the plaintiffs to enrich themselves at the expense of others.

The law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved, and in whose front the banquetting is to be made.

The constitutional objection to the twenty-fourth section of the city charter, on the alleged ground that it imposes a tax which is not equal and uniform, is not well taken. The court does not understand that any tax is imposed by said section, in the technical sense of the word. It merely requires each proprietor to pay for his banquettes, and authorizes them to indicate when the banquette

BANQUETTES—Continued.

shall be made and the character thereof; and, in doing this, the Legislature does not violate any provision of the constitution.

Hermann Daniel et als. v. City of New Orleans, Page & Co., et als., 1.

BATTURE.

1. This suit can not be maintained under the provisions of art. 509, C. C. and section 318, of the Revised Statutes, on which plaintiff relies in claiming the batture to which she alleges to be entitled, inasmuch as she is not a riparian proprietor and does not even own the soil situated on the edge of the water.

Mrs. Wm. A. M. Winter v. City of New Orleans, 310.

BILLS OF LADING.

1. When cotton is on board of a ship and under bills of lading when seized, it must be considered as under the control of the master of the ship, and the master holds it subject to the owners of the bills of lading—who are the intervenors in this case.

B. M. Horrell & Co. v. H. N. Parish, 6.

2. There is no validity in the allegation that the title of defendants is not complete, because the bill of lading is not perfect, inasmuch as when the bill calls for cotton "as marked in the margin," there are no such marks. There was nothing suspicious in the transaction, and the intervenors may be considered as sufficiently prudent when they treated on the pledge of the bill of lading. *Ibid.*
3. A bill of lading is, after all, only the evidence of a contract to deliver property at a certain point, and it is not the marks on the margin therein, or on the property shipped, which give life to the obligation. The marks are given only for the convenience of identification. But in this case there is no question of identity.

Ibid.

4. Another fatal bar to plaintiff's right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was recorded eight days after this suit was instituted. Therefore, plaintiffs had lost their privilege as to the intervenors.

Ibid.

5. The material facts in this case are as follows: The plaintiffs were, in 1871 and 1872, the commission merchants and factors of Wilkinson, who owed them in April, 1872, about \$18,000 evidenced by two notes secured by mortgage, at which date their payment was extended to first of February, 1873. A pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873, to the amount of \$12,000, the planter obligating himself to ship the crop of that year and each subsequent year, if necessary, to pay the said sums with

BILLS OF LADING—Continued.

interest, and all commissions, expenses, etc. In December, 1872, the shipment in question made of hogsheads of sugar and barrels of molasses, marked with the initials of plaintiffs, but without any special instructions from Wilkinson. The plaintiffs received the bill of lading early on the morning of the day of its arrival. A few hours afterwards, on the same day, the sheriff of the parish of Orleans, with a *fi. fa.* from the parish of Plaquemines, in the suit of D. and J. D. Edwards v. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon the plaintiffs claiming the custody and control of the said property to the exclusion of Wilkinson's creditors and as exempt from seizure by them, took an injunction.

The court thinks that the property belonged to Wilkinson, the shipper, and that his creditors might seize, subject to the rights of the consignees to be settled contradictorily with the seizing creditors, inasmuch as the consignees were the agents of the shipper, and their constructive possession under the bill of lading, did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under the *fi. fa.*, or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances.

The injunction was not the remedy to which the plaintiffs were entitled. The sheriff should have proceeded with the sale, leaving the plaintiffs and defendants to settle their respective rights to the proceeds.

Chaffraix & Agar v. W. P. Harper, Sheriff, and D. & J. D. Edwards, 22.

SEE PRIVILEGE, No. 5—*Glover & Odenhall v. G. B. Shute, 350.*

BILLS OF EXCEPTIONS.

1. Where the judge *a quo*, on a rule to show cause, answered: that several days after the rendition of the judgment by the jury, the defendant's counsel importuned him to sign a document tendered to him as a bill of exceptions; that respondent refused to sign the document presented, because it was not a bill of exceptions; that bills of exceptions can only be taken in civil cases during the trial; that they must show upon their face that they were signed at the trial, and that no bill of exceptions will lie after the trial and rendition of a verdict; that the counsel of the defendant on the Saturday previous to the Monday on which the verdict of the jury was rendered, did not ask to be allowed a bill of exceptions to the action of the court;

Held—That the respondent, in the main, assigned reasonable cause for declining to sign the bill of exceptions.

State of Louisiana ex rel. Garthwaite, Lewis & Miller v. The Judge of the Fourth District Court, parish of Orleans, 66.

BILLS OF EXCEPTIONS—Continued.

2. The defendants, except one, who has not appealed with the rest, pleaded certain exceptions and answered to the merits. The case was submitted to the judge on the merits, without his being previously required to dispose of the exceptions. The rule is that the exceptions are considered as abandoned in such a contingency. This rule is not inapplicable because the defendants were not present at the trial. If they desired their exceptions passed upon by the court it was their duty to be present, to urge it, before the case was taken up on its merits.

Richard Frances v. Lavine et al., 311.

3. When default was entered and confirmed in this case, exceptions filed in due time were pending and not disposed of. This was irregular and entitles the defendant to a reversal of the judgment, and an opportunity to be heard on his exceptions.

State of Louisiana v. Francis Vallette, 730.

SEE PRACTICE No. 6—*Denouvion v. Rebecca McNight*, 74.

BILLS AND PROMISSORY NOTES.

1. Plaintiff claims to be the owner of certain notes which were placed by his agent into the hands of Ducros, a broker, to be sold by him, and which he avers that Ducros illegally pledged to the defendant as security for a debt of his own.

That Ducros owed the bank when the notes were put in its possession can not be disputed; that they were given to secure its indebtedness is established; and that the bank had the right to receive them, is equally clear. The lawful possession of the notes by Ducros can not be questioned. Being the lawful possessor, he was, as to third parties, the owner. Being the apparent owner, he could dispose of them; if he saw fit to place them in the hands of the bank in extinction of, or as a security for, a lawful debt, the bank had the right to receive them, and they must remain with the bank until its debt is paid. The responsibility is from Ducros to his principal; and not from the bank to the party who claims that Ducros cheated him.

The burden of proof was on the plaintiff to prove, as he alleged, that the bank gave no valuable consideration for the notes; that it is not the *bona fide* holder thereof; and that they came into the possession of the bank in an illegal and unlawful manner. There was nothing in the transaction beyond the taking by the bank of security for the payment of a pre-existing debt, and this it was authorized by law to do.

Marco Giovanovich v. Citizens' Bank of Louisiana, 15.

2. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does

BILLS AND PROMISSORY NOTES.—Continued.

not come under the exceptions contained in the 494th article of the Code of Practice.

More than a year having elapsed from the last payment of interest to the institution of this suit, the usurious payments which were expressly imputed by the parties to the interest can not now be recovered back, nor imputed to the capital.

James McCracken, Administrator v. James Madison Wells, 31.

3. In view of the facts detailed by plaintiff himself, showing that he and his family, departing from New Orleans, where his usual residence used to be, lived and resided during the war within the Confederate lines, it is evident that plaintiff did not reside in New Orleans on the sixth of April, 1863, the time of the protest of the note on which he appears as indorser, and that, as he had no known place of residence, the notice deposited for him by the notary in the postoffice, pursuant to the act of 1855, was sufficient to fix his liability. *Samuel Jamison v. J. H. Pothaus et als.*, 63.

4. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Ibid.*

5. When a note is negotiable, it is competent for plaintiff, in his capacity of agent, to treat the instrument, as between himself and all other persons except his principal, as his own. In this case the defendants have shown no equitable grounds of defense they were entitled to set up against the maker of the note.

Charles Zapata v. Honorine Cifreo and Eliza Bougere, 87.

6. There is no law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

First National Bank of Macon v. B. B. Simmes, 147.

7. Where the note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage, no other proof than possession is necessary.

The plea that the defendant's title to the land purchased and for which the mortgage note was given is not perfect for the whole, can not be sustained. He does not allege that he has been dis-

BILLS AND PROMISSORY NOTES—Continued.

turbed in his possession; that he has been sued; or that he is threatened with a suit for the property. Besides, the parties interested in that question, who were called in warranty, are not before this court. *Ibid.*

8. The defense in this suit, instituted on two drafts drawn by defendant, payable to his own order, indorsed by himself, and accepted by Scott & Jackson, the drawees, is, that they were transferred after maturity and form a part of unsettled accounts existing between himself and the drawees, upon a full settlement whereof their drafts would be found to be paid.

Being in the possession of the drawees after maturity, the drafts were extinguished either by payment or novation, and they became mere *vouchers* for the amounts charged on the books of the acceptors against the defendant, and the acceptors could not resuscitate the drafts or bills of exchange by reissuing them after maturity and after they had taken them up.

Scott & Jackson, the drawees and acceptors, could not have maintained a separate action on those drafts after having carried them through their accounts current with the drawer. Their only action against the defendant was for any balance due on the account of which said drafts formed a part, and the transferee of Scott & Jackson acquired no greater right than they had.

George L. Walton v. Henry C. Youny, 164.

9. The note sued upon in this case was deliberately given, and was secured by mortgage. No fraud is alleged. Whether usurious interest was included in it or not is immaterial under the laws of the State.

Besides, after several partial payments had been subsequently made, a settlement was had, and the defendants, again in writing, acknowledged themselves to be indebted to the plaintiff in the sum claimed.

John J. Carruth v. Carter & Brother, 331.

10. Robertson, the defendant, had drawn two drafts on T. H. & J. M. Allen & Co., made garnishees in this suit, who had verbally accepted the same to be paid, as far as possible, out of the proceeds of the sale of Robertson's cotton, then in their hands. This was a good acceptance, and the intervenors in this case, who are the holders of the accepted drafts, are entitled to have them paid out of the proceeds of said cotton.

James M. Kane v. John W. Robertson, 335.

11. The plea of novation is established in this case. The plaintiff had an account against the New Orleans Manufacturing and Building Company. For this account the note sued upon was given. The

BILLS AND PROMISSORY NOTES—Continued.

account was receipted in full, and the debtors, Fulkerson, McLaurin & Co. were substituted for the old debtor.

David C. McCam v. Fulkerson, McLauren & Co. and the New Orleans Manufacturing and Building Company, 344.

12. The plaintiff claims the value of a carriage and harness he purchased from defendants and left with them on storage. He had paid a portion of the price in cash, and for the balance gave the defendants a note of J. B. Hood to the order of and indorsed by plaintiff which was taken as a payment of the bill for the carriage, and a receipt in full given. The note was not paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights, they had no authority to sell the plaintiff's property which was stored with them subject to his order.

James Longstreet v. R. Marsh Denman & Co., 384.

13. The defendants, successors of Warren, Gilmore & Co., and agents of J. & F. Roberts, who are the drawers of a certain draft, accepted for accommodation by Warren, Gilmore & Co., offered to plaintiffs, indorsees thereof, to pay them within the time agreed upon, a certain stipulated amount for the extinguishment of the draft, which plaintiffs refused to take. No real tender or deposit was made.

The defendants, as the agents of J. & F. Roberts, had a right to tender performance of the contract for said Roberts, and plaintiffs were bound to receive the money in discharge of the contract. The plaintiffs' peremptory refusal dispensed with the actual production of the money or the presence of witnesses as required by article 407 of the Code of Practice, as no one is required to do a vain thing.

Interest, therefore, could be allowed only from judicial demand.

McStea & Value v. Warren & Crawford, 453.

14. The plea of prescription is set up against the suit of plaintiffs based upon the following instrument: "New Orleans, June 3, 1862. Due Messrs. Spearing & Co. six thousand dollars in current funds, subject to their draft or drafts, at not less than sixty days after sight." This instrument is virtually an unconditional promise to pay a specific sum in current funds sixty days after demand. It contains substantially the elements of a promissory note. Therefore the action is barred by the prescription of five years.

Spearing & Co. v. Succession of J. W. Zacharie, 496.

15. Where the indorsers on a promissory note are sued, it is not necessary, when they had filed only a general denial, to prove their signature, the note having been received without objection.

James M. Lewis v. Fairbanks & Gilman and D. & J. D. Edwards, 536.

BILLS AND PROMISSORY NOTES—Continued.

16. This suit is brought on a bill of exchange. The fact that the plaintiffs acquired the instrument after its maturity must determine the case against them. This rule seems to admit of no exception, that a party, taking a bill or a note after its maturity, takes it subject to all the equities and exceptions that might exist between the original parties.

It is a principle of the commercial law that the bare fact that a negotiable instrument is unpaid at its maturity is a circumstance sufficient to raise the presumption of fraud, and that there exists some solid reason why it was not paid.

The law of merchants being the law of honor, all bills and notes, the instruments of commercial transactions, will, if it is presumed, be promptly paid when due.

A negotiable instrument, unpaid at its maturity, shows upon its face that it was dishonored, and a person who takes it can not be allowed to claim the privilege of a *bona fide* holder without notice.

The plaintiff in this case acquired the bill long after its maturity. The circumstances under which the owner thereof was deprived of its possession, precludes the inference that the captors acquired by the rules of war a legal title.

The want of title in any of the parties acquiring the instrument after its maturity, could therefore be set up by the defendants against the holder.

Mrs. Lizzie Clara Davis, wife of Frank E. Mumford, and her minor child, R. E. Smith, v. Bradley, Wilson & Co. 555.

17. The nonpresentation of a check within a reasonable time may, under the circumstances of the case, amount to such laches as will release the indorser thereof. *Simon B. Miller v. M. C. Moseley*, 667.

18. The stamping of the note sued upon was not necessary as the act accompanying the note was stamped.

The objection that the note was not presented at the place of payment at its maturity, according to the agreement of parties, is not fatal. This agreement is not a stipulation in the act of sale and mortgage connected with the note, but was added to the note some time after its date, and authentic proof of a compliance therewith can not be required.

The alleged insufficiency of the stamps, amounting to fifty cents on the act of mortgage, does not invalidate the writ of seizure and sale issued on the evidence of said mortgage act; it is on the authenticity of the evidence that such a writ is based. Here the evidence was authentic, and therefore the order properly issued. If the defendant was injured by the proceeding, she has not adopted the remedy by which her injuries could be inquired into.

J. F. Pargoud v. Mrs. Sarah Richardson, 672.

BILLS AND PROMISSORY NOTES—Continued.

19. Where A, in order to raise money to pay his creditor B, authorized B to draw on him a draft which was accepted and negotiated, but not paid when due ;

Held—That B had a right to expect his draft to be honored and is discharged from all liability on the draft by the laches of the holder in not giving him notice of non-payment.

B. M. Johnson v. F. A. Flanagan et al., 689.

20. When a promissory note was signed in the name of a partnership after the dissolution thereof by the death of one of the partners and the party who signed it was not authorized to do so for the firm but where it was also fully proved that the only member of the firm before the court, in his individual and fiduciary character, acknowledged his liability on the note and promised specially to pay it, and that it was given for a debt of the firm, which he assumed to pay as the transferee of the interest of the other surviving partner ;

Held—That he was, under these circumstances, bound to pay the claim sued on.

Peet, Yale & Bowling v. S. H. Riley & Co. et al., 712.

21. Where the act of mortgage to secure the payment of a note given for a valid consideration by a married woman, separate in property from her husband, was dated on the eleventh of May, the authorization of the judge dated on the tenth, and the note on the first of the same month ;

Held—That though the note bears a different date from the act of sale and mortgage, it was given for a part of the price thereof; that it formed part of the same transaction, and that the authorization of the judge covered the debt in question, which inured to the benefit of the wife.

M. D. F. H. Brooks v. Mrs. M. W. Stewart and Husband, 714.

22. At the maturity of the note sued upon in this case, it was protested without presentation for payment, or demand on any one for payment, and it is not proved that it was impossible to make a demand for payment. This was necessary to bind the indorser.

Union Insurance Company v. Succession of C. W. Rodd, 715.

23. J. M. Alva, as administrator of the estate of Widow Forneret, opened an account in the Louisiana State Bank, which being balanced, July 31, 1862, showed to his credit the sum of \$6038 60 for deposits alleged to revert back to 1858. On the twenty-seventh October, 1865, said administrator gave a check for said amount in favor of the State Treasurer, which was accepted by the Bank. On the twenty-fifth March, 1873, suit was brought by the heirs of Widow Forneret to recover the said balance of deposits in gold,

BILLS AND PROMISSORY NOTES—Continued.

without making any reference to the check for said amount. On the ninth of April, 1873, they filed a supplemental petition making the accepted check the basis of the action ;

Held—That the judgment of the court *a qua*, ordering the check to be paid in United States currency, and not in gold, was correct. But the defendant is only liable for interest from the ninth of April, 1873, the day of judicial demand on the check.

Antonio Partegas et al. v. State National Bank, 728.

24. While a party is before the court in the attitude of the *bona fide* holder of a note, he can legally object to any inquiry into the consideration of the note.

Citizens' Bank of Louisiana v. J. Strauss, 736.

25. Where it is proved that the indorser of a check indorsed it for no other purpose than to identify the person who presented it to the bank, and who was in the habit of collecting for the parties to whose order the check was drawn ;

Held—That the responsibility of the indorser was as to the identity of the collector, but not as to his authority to sign the check for the parties to whose order it was given. The question is to be decided by taking into consideration in what manner and for what purpose he bound himself. For as he bound himself, so will he be bound.

Commercial Press, Smith & Goldsmith, Proprietors, v. Crescent City National Bank—Schultz, Warrantor, 744.

SEE HUSBAND AND WIFE, No. 19—*Koechlin v. Mrs. Thontke*, 737.

SEE CORPORATIONS, No. 8—*Donnelly v. St. John's Protestant Episcopal Church*, 738.

SEE PRIVILEGE, No. 2—*Succession of A. H. D'Meza*, 35.

SEE SEIZURES AND SALES, No. 8, 9—*Johnson v. Dunbar*, 188.

SEE PRESCRIPTION, No. 4—*New Orleans Canal and Banking Company v. Tanner*, 273.

SEE SEIZURES AND SALES, No. 14—*O'Hara v. Folwell*, 370.

SEE HUSBAND AND WIFE, No. 11—*Garner v. Gay and Sheriff*, 375.

SEE HUSBAND AND WIFE, No. 1, 2—*Mrs. Feltus v. Blanchin and Giraud*, 401.

BONDS.

1. It has been so often decided that a defendant may release on bond the sequestration of his property that it can no longer be considered an open question.

The right to appeal from the order refusing this right is equally well settled.

State ex rel. R. Taylor v. Judge of the Superior District Court, 65.

BONDS—Continued.

2. It is not true that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered ex officio by the court under article 274 can not be thus released. *Ibid.*
3. Article 279 C. P. means what it says. Its terms are general, except in cases of failure, any sequestration may be released on bond. Were the meaning of article 279 doubtful, a liberal construction would be given to it, because the article is remedial in its character. *Ibid.*
4. In March, 1868, judgment was rendered in the United States District Court against the steamboat Magenta, Captain Leathers as principal, and against his sureties on a release bond. The plaintiff was one of the sureties. Leathers desired that an appeal be taken, and that plaintiff, Conery, should sign the appeal bond, but Conery was anxious to be released from said bond and from the appeal bond to be signed, and from all liability on the same. Whereupon, to induce said Conery to sign the appeal bond, the defendants gave the bond on which this suit was brought, and the condition of which was to hold Conery harmless from any and all liability on the two bonds, refund to him any sum he might be compelled to pay by reason of the release and of the appeal bonds, and cause the said bonds to be canceled and annulled within one year, and in default thereof to discharge the claim of the libellant in the suit in which appeal was taken.

Defendants plead want of consideration; but Conery may have thought that his interests would be best subserved, at the time and under the circumstances, by taking such a step as would then secure his recourse against the principal on the return bond upon which judgment was already rendered, and that the delay of an appeal would endanger such recourse and fix absolutely his individual liability. It is to protect him against such contingency and release him from all liability in the matter that the bond was given. It constitutes a valid consideration for an obligation.

The amended answer of the defendants shows that the judgment from which an appeal had been taken was reduced, and after becoming final, was paid by plaintiff, Conery, who caused himself to be subrogated to the rights of the libellant. This does away with the plea of the defendants that the suit was premature, inasmuch as nothing had been paid by plaintiff at the time of the instituting of said suit. The defect was cured if it existed.

Under the stipulations of defendants' bond, plaintiff was not compelled, before he pursued them for the reimbursement of what he had paid, to exhaust all recourse against the principal on the release bond. *Edward Conery v. J. W. Cannon et al.*, 123.

BONDS—Continued.

5. Certain blank licenses signed by the State Auditor, which were part of those delivered by him to the defendant, a tax collector, and for which the collector stood charged in the Auditor's books, were offered in evidence to show that neither said Ranson nor his sureties could be liable to pay for said licenses. The court *a qua* properly refused to admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

6. The prescription of two years, pleaded in defense in this case, applies to acts of omission and commission, misfeasance, non-feasance, etc., of the sheriff, as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. The defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes. *Ibid.*

7. Some personal property of Weiss, attached at the suit of Joseph Hoy & Co., was ordered to be sold as perishable property pending the attachment suit and bonds were taken by the sheriff for the price thereof.

The bonds, therefore, simply represented the property attached or the proceeds of the sale thereof, and they belonged to Weiss, not to the sheriff, who was a mere stakeholder. There existed no reason why the sheriff could not seize them at the suit of another creditor, as the property of Weiss, subject of course to the prior attachment.

The suspensive appeal taken by Joseph Hoy & Co. from the judgment dissolving their attachment could not prevent Eaton & Barstow from seizing the property attached.

Joseph Hoy & Co. v. Eaton & Barstow and Sheriff, 169.

8. The judgment of the district court dissolving the attachment of Joseph Hoy & Co. having been affirmed on appeal, said attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure, and the proceeding by garnishment on the part of Joseph Hoy & Co. against the sheriff after said seizure, did not affect it, or the rights of Eaton & Barstow under it—being *res inter alios acta*.

The right to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. had no right to do so. *Ibid.*

BONDS—Continued.

9. When the judge fixed no amount for the appeal bond and a suspensive appeal was granted on giving bond conditioned according to law, the appeal will be dismissed. The amount of the appeal bond is not sufficient for a suspensive appeal, and it will not do for a devolutive one, because it was not for an amount fixed by the judge. *Bridget Bookel et al. v. Joseph Rudman et al.*, 208.
10. The plaintiff has sued Eugene R. Biossat, parish treasurer, and the sureties on his official bond for a certain amount of school funds, and has sought to enforce a legal mortgage for said amount against their property.

The suit being on the bond of the parish treasurer, the prescription of five years pleaded in this court is not applicable.

John Olements, President of the Police Jury of the parish of Rapides v. Eugene R. Biossat et als., 243.

11. As the bond was recorded in the bond book, but not also in the mortgage book in the recorder's office of the parish of Rapides, it did not operate as a mortgage on the property of the defendants, the principal and the sureties on said official bond. *Ibid.*
12. The delay of one, two and three months allowed to the delinquent parish treasurer, to pay over a certain amount of the school funds, was a mere indulgence, and it did not have the effect of discharging the sureties on his official bond, whose undertaking was to be security that he should account for and pay over all school funds coming into his hands as parish treasurer.

Besides, the school board had no authority to make a contract having directly or indirectly for its object the discharge of the sureties on the bond of the parish treasurer.

Furthermore, there was no consideration for the delay granted, and as a contract it was not obligatory. *Ibid.*

13. The court *a qua* did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278, by reason of a voucher showing the fact. The voucher was the best evidence and should have been produced.

There is no force in the objection that the official bond covered the acts of the treasurer only for two years. The funds in question came into the possession of Biossat while he was parish treasurer, and the sureties on his official bond are responsible on account of his failure to pay over the same, regardless of the fact whether his term of office has ceased or not. The conclusion is that the sureties are solidarily bound. *Ibid.*

14. Article 261 C. P., authorizing the sale for certain causes, of property under attachment, does not direct the sheriff to take from the purchasers bonds in the nature of judgments, as in sales under

BONDS—Continued.

executions, and the expressions "to have the force and effect of a judgment at law," used in said bonds, must be considered as mere surplusage. This court knows of no law which gives to such bonds the form of a judgment upon which an execution may issue. Therefore the injunction in this case should have been maintained without prejudice to the rights of parties upon the said bonds.

Julius Levin et als. v. John De Lacy, Sheriff, et als., 270.

15. The plaintiff sues for the sum of \$590 92, the amount of a conditional bond which reads as follows: "That whenever the syndic shall erase the tacit mortgage in favor of the minor Louis Roy, surviving child of Felicien Roy, which exists on the lot of ground and improvements, purchased by Auguste Bernard at the sale of E. T. Parker, syndic v. Joseph Grelier, No. — of the docket of the Second District Court of New Orleans, then and in that case this bond shall have force and virtue."

The defense that the tacit mortgage is not raised can not prevail. It is fully established that by order of court plaintiff paid Grelier the amount of the conditional bond, and that, if the minor ever had a tacit mortgage on the property, it was lost from failure to record the evidences of it prior to the first of January, 1870, under the provisions of the Constitution of 1868.

E. T. Parker v. A. & X. Bernard, 275.

16. In October, 1867, David Grant enjoined the execution of a judgment which his partner, George McGibbon, had confessed against the commercial firm of Grant & McGibbon in favor of R. C. Hyatt, and the defendant, W. R. Bell, signed as security the injunction bond. Before the trial of the injunction suit, Hyatt transferred to the plaintiff, H. Pottier, all his right, title and interest in and to the judgment. The injunction was subsequently dissolved by a judgment in the court below which, on appeal was affirmed in this court.

This suit is brought by Pottier, the transferee, to recover damages on the injunction bond. It is contended by the defendants that there is no privity between them and the plaintiff, because the bond is not in his favor, and the right to claim damages for the illegal injunction was not transferred to plaintiff together with the transfer of the judgment enjoined.

The defense is not well founded. The injunction suit passed as an accessory to the plaintiff with the judgment he bought from Hyatt. After said purchase the plaintiff alone had an interest in resisting the injunction which had but a short time before been taken out, and became the real defendant in said suit, because he was the owner of the judgment enjoined, and the injunction bond,

BONDS—Continued.

although in favor of Hyatt, must be held to be in favor of the owner of said judgment, who acquired the essential right to execute it and also to claim damages for the illegal restraint of the exercise of that right.

H. Pothier v. David Grant and W. B. Bell, 283.

17. The motion to dismiss the appeal on the ground that the bond is not made payable "to the clerk of the court," can not prevail.

The bond is given in favor of H. L. Burns, his executors and administrators and assigns.

The certificate to the transcript shows that H. L. Burns is the clerk of the court, besides other evidence thereof in the record.

Without any evidence this court will take notice of the official capacity of H. L. Burns as a public officer of this State, and will presume that a judicial bond given in his favor was given in reference to that capacity and in reference to the statute requiring the bond to be given in favor of the clerk of the court.

There is no doubt that the bond could be enforced against its makers, having been given in reference to the law, and this is the proper test of its sufficiency. *I. Tharp v. O. V. Waggoner, 317.*

18. Seven suits were filed in the Sixth District Court, parish of Orleans, against W. C. Harrison. Judgment being given against him in every case, he took a suspensive appeal in all of them, furnishing his bond with J. S. Simonds as security. Subsequently, to save costs, it was agreed between the parties to the suits, that only one record should be made up and filed in the Supreme Court, and that its decision in that case should be the judgment in all the other cases.

It is impossible to see how or why the surety was, as contended, released by that agreement. The case which was decided was a test one; it was identical with the other cases not filed in the Supreme Court in virtue of the agreement aforesaid, which did not affect the suspensive appeal taken. It only dispensed with making more than one transcript, to avoid unnecessary costs.

Succession of John Sheldon Simonds, 319.

19. The State, on the petition of the Attorney General, having enjoined the Auditor and the Treasurer from issuing warrants for the payment of and from paying certain obligations of the State, and having prayed to have the appropriations therefor and the said liabilities declared null, the New Orleans, Mobile and Texas Railroad Company intervened and moved to dissolve the injunction so far as it applied to the bonds of the State issued to said company. The grounds of the injunction were that the appropriation for the payment of the coupons of said bonds is a disguised donation of

BONDS—Continued.

the funds of the State to a private corporation; that the Governor had no authority to subscribe for the stock of said company and that the act 95 of 1871, by virtue of which the said bonds were issued, attempted to create a debt exceeding \$100,000, without providing adequate means for its payment as required by article 111 of the State constitution, and also in excess of the constitutional limitation to the State indebtedness.

It is contended, on the other side, that the State can not sue to annul the bonds in question without first tendering back the stock which it is admitted has been received by the State in exchange for the bonds.

The doctrine of tender could not be properly applied to this case. The State does not seek to annul the contract and recover back the bonds given as the price. The law officer of the State simply asks that her fiscal agents be prohibited from paying certain bonds and coupons, on the ground that the law which authorized their issuance is unconstitutional.

The suit was not against the holders of the bonds, or the parties to the contract, and there was no one to whom the tender of the certificate of stock could be made. The injunction or prohibition issued on the petition of the Attorney General, made it legally impossible, while it existed, for the fiscal agent to pay, and in this way only were the rights of the intervening company affected, and the necessity imposed upon the company to take some legal proceedings to obtain payment. They chose to intervene in these proceedings in order to assert their rights and remove the obstructions to their access to the State treasury. They are therefore not in a position to plead that a tender of the stock should have been made to them before the issuance of the injunction herein, although it practically closed the treasury to them. But any judgment in the suit to which they were not made parties, would not have been *res judicata* as to them.

This case must be remanded for further evidence and such proceedings as may be appropriate.

State of Louisiana v. Charles Clinton, Auditor, and A. Dubuclet, Treasurer. New Orleans, Mobile and Texas Railroad Company, Intervenor, 346.

20. There is no law which prohibits a member of the bar from becoming a surety on a sequestration bond. If there be any rule of court to the contrary, it is not known on what authority it rests.

John F. Daly v. E. E. Duffy and Schoenhausen, 468.

21. It is a rule of our jurisprudence that if a shorter prescription is not specially applied to personal actions, they are not prescribed by

BONDS—Continued.

two years. There is no law fixing specially the prescription of actions against recorders.

This is an action against the recorder of the parish of Morehouse and the securities on his official bond for the damages resulting from a failure of official duty by the deputy recorder in not reinscribing a certain judgment within the proper time, as he, the deputy, was specially instructed to do, by which omission the debt due plaintiff was lost. This action is one *ex contractu*.

The recorder had a special duty to perform, embraced within the obligation of his bond given according to law with two good securities, and his failure or that of his deputy, duly appointed to perform that duty, is a breach of his bond on which he and his deputies may be sued.

The argument that it is not an action on the bond, because it is not established that the consent of the sureties was given to the appointment of the deputy, which was necessary to make them liable, and that its omission shows the action to be one against the recorder alone for his negligence, is not sound. It might perhaps result in releasing the securities on the trial, but can not change the character of the action.

Damages *ex delicto* flow from the violation of a general duty; damages *ex contractu* are the consequence of the breach of a special obligation, such as the special obligation imposed by law on the recorder, in this case, to reinscribe a certain judgment.

The recorder and his securities had entered into a specific contract with the State, for the benefit of those interested, that he and his deputy would faithfully perform each duty of his office, and his failure in such respect is a breach of that contract. The action to which it gives rise is not prescribed by one year.

In this case, the deputy recorder promised to perform a special duty as requested on behalf of plaintiff, and the latter had the right to suppose the promise and duty would be observed by the officer. The failure of the plaintiff to go afterwards (as it would have been prudent for him to do) to see that the officer had done his duty, is not such a negligence, under the circumstances, as to affect his right of action against the defendants. The other allegations of negligence against the plaintiff have no force.

The objection that plaintiff or his attorney should have furnished the recorder with a certified copy of the judgment for reinscription and tendered the fee, if of any force under the circumstances, is removed by the promise of the deputy to make the inscription without requiring such copy or fee.

The argument, on behalf of the sureties, that they can not be con-

BONDS—Continued.

demned to pay, because the recorder did not obtain their written consent to the appointment of the deputy, as provided by law, can not avail one of the securities who is himself the deputy. As to the other, the matter should have been specially pleaded. It is raised for the first time, in this court, under the general issue.

J. H. Brigham, Curator, v. A. L. Bussey et al., 676.

22. A certain quantity of cotton sequestered at the suit of plaintiff, who claimed \$772 55 from Grant, his employer, was released upon a bond on which defendant went surety, and a judgment was rendered against Grant in favor of plaintiff, by consent, for \$532, with privilege. After the issuing of a *fiery facias* and the return of *nulla bona*, the defendant being sued to make him responsible as surety on the bond;

Held—That the admission of Grant that he owed a certain sum—less than the sum claimed—for which amount judgment was rendered, did not release the surety on the bond from paying the judgment which he had agreed to pay, should judgment be rendered against the principal on the bond. The defendant was not surety for any debt due by Grant to plaintiff, but had merely bound himself to satisfy any judgment which might be given.

Dodson Harrell v. John G. Sanders, 691.

23. The objection that a privilege can not be given by consent is not to be taken into consideration, because the plaintiff's right to recover does not rest upon the privilege which was granted to him by the judgment, but on the judgment itself.

The defense that defendant is not responsible on the bond, which, it is alleged, has none of the features of a legal bond for the delivery of property sequestered, is not valid. The bond must be considered with reference to the law under which it was given. No matter what the parties choose to call it, the law designates it as a forthcoming bond, and as such it must be regarded. *Ibid.*

24. The surety on a release bond is responsible only for the value of movables, when not delivered according to the stipulations of the bond after judgment in favor of the plaintiff. It is only when the property is land that the law fixes responsibility for revenues.

Jean Segassie v. Antoine Piernas et al., 742.

SEE LAWS, No. 1—*Commissioners of Immigration v. C. L. Brandt et als.*, 29.

SEE AUCTIONEERS, No. 2—*State v. Blohm et als.*, 538.

SEE CRIMINAL LAW, No. 20—*State v. Herpin*, 612.

COLORED PERSONS.

1. Under the first section of the civil rights act, the sixth article of the constitution of the United States, and the State constitution

COLORED PERSONS—Continued.

of 1864, title 1, art. 1, Cornelia Hart, a colored person, was vested in November, 1867, with the right to enter into a contract of marriage, and her marriage at that epoch with C. E. Hart, a white man, was clothed with all the formalities required by law—which marriage, if there existed any doubt as to its validity, would have to be considered as ratified and confirmed by art. 149 of the State constitution of 1868.

In 1867, when the marriage of Cornelia Hart was effected, the incapacity attaching to her children under former laws, of being legitimated on the ground of the legal inability of their parents to contract marriage at the time of the conception of the children, had been obliterated.

It is considered well settled that other modes of the acknowledgment of illegitimate children, besides that by notarial act, are authorized by the laws of this State. Any alteration made in the Code of 1870 as to this matter, could not affect the rights of the children of Hart, which were fixed in 1867.

The fact that C. E. Hart, now deceased, had acknowledged as his children the issue of his cohabitation with Cornelia, is sufficiently established to enable this court to decide that they were capable of inheriting from their father at the time of his decease in 1869.

Cornelia Hart, Tutrix v. Hoss & Elder, Administrators. T. E. Hart v. the same. (Consolidated.) 90.

SEE MARRIAGE, No. 1—*Succession of Henderson Randall*, 163.

COMMUNITY.

1. Under no circumstances, according to our jurisprudence, can the plaintiffs recover any portion of the community property, sold for a community debt, without first paying or tendering the amount by which they have been benefited from the price thereof paid by the purchaser.

Harriet B. Kellogg et als. v. J. V. Duralde, Sheriff, et als., 234.

2. The plaintiff sues defendant for the balance of an account for supplies furnished to make a crop, which he alleges inured to her benefit. It was incumbent on plaintiff to prove that the articles thus furnished had inured to the benefit of defendant, as alleged, but he has failed to do so. Besides, this court is satisfied as to the correctness of the defense—which is—that the debt is a community debt for which the defendant, who was a married woman, can not be held responsible.

Frederic Fluke v. Mrs. Mary A. Martin, 279.

3. This suit is instituted by the plaintiff against the purchasers at sheriff's sales, he claiming that the property was community property and belonged equally to his father and mother; that when

COMMUNITY.

his mother died the community was dissolved; that his mother's share descended to him; that his title thereto has never been divested; and that he should now be quieted therein.

The property was sold to pay community debts. Therefore the plaintiff's claim must be rejected.

Samuel Ricker v. Widow and Heirs of John H. Pearson, and Samuel Ricker v. Annie O. Diggs, now Ross, 391.

4. The court below did not err, as contended by the opponents, to the tableau of the administratrix, in not charging the community existing between the deceased and his surviving widow with a certain sum of money received by the deceased, during marriage, from the sale of his separate property, because it is not proved that this money was expended by the deceased for the benefit of said community.

Whether the individual debts of the deceased were discharged by the giving in payment of certain slaves belonging to the community existing between the deceased and his surviving widow, administratrix, of his estate, or by funds arising from the sale of said slaves, the result is the same. The community should be credited for the amount of its property disposed of for the individual benefit of the deceased.

Hypolite Belair, Natural Tutor, et als. v. Celina Dominguez, Administratrix. Opposition of the heirs to the tableaux filed by the administratrix, 605.

SEE ACTION, No. 11—*Daniel v. Ivy et als.*, 639.

SEE HUSBAND AND WIFE, 3, 4, 5, 6—*Hawley, Administrator, v. Crescent City Bank et als.*, 230.

COMPROMISE.

1. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Samuel Jamison v. J. H. Pothaus et als.*, 63.
2. The act by which the annuity for life claimed in this suit was established, seems to have been a compromise between the parties interested in the succession of plaintiff's husband—one of the conditions being that she should withdraw her application to be appointed administratrix thereof, and that the payment of said annuity might be made either by Henry Boyce or the heirs of Mrs. Irene Boyce. This agreement was subsequently carried out by them partially by making payments thereon.

COMPROMISE—Continued.

This is a contract which the parties could legally make. They are bound by it. The loss to the defendants of the property of the succession of Irene Boyce can not affect plaintiff's rights. It was a clear transfer of the interests in and to their succession, which she had the right to sell and the defendants to purchase. If the property perished, or was taken from them, the loss was theirs.

But there is error in that part of the judgment which condemns Powhatan Clark, the husband of one of the defendants. He was not a party to the contract, and his wife entered into it before he married her. The property claimed in his intervention can not be made responsible for his wife's obligation contracted before marriage. The community which had existed between them had been dissolved.

Mrs. Emily M. Archinard, Widow v. Mrs. Louise Boyce, Wife of Powhatan Clark, Intervenor, and Henry A. Boyce, 292.

3. Compromises have no immunity from decrees of nullity, where errors of fact bearing upon the principal cause of the compromise and coupled with fraud, are shown to exist, and in such cases, said compromises must be declared null and void.

J. Q. Packard v. Ober, Atwater & Co. J. Q. Packard v. Ober, Atwater & Co., Garrard & Craig, and John P. Moore. (Consolidated.), 424.

4. This is a suit to recover a certain piece of land on the ground that the plaintiffs were unjustly deprived of it by illegal proceedings, among which was a certain compromise executed by their tutor. All the proceedings complained of were duly homologated and confirmed. The power to effect the compromise was conferred upon the tutor by a family meeting. The clerk, in rendering the order of homologation, had the authority to order the tutor, in pursuance of the directions of the family meeting, to carry out the compromise. The authorities in support of transactions of this kind are numerous in our own jurisprudence.

Mahle et al. v. Elder et al., 681.

SEE HUSBAND AND WIFE, No. 9—*Barron v. Sollibellos, 289.*

CONSTITUTION.

1. Article 123 of the State constitution does not impair the obligations of contract, and is not violative of the constitution of the United States.

E. Rochereau & Co., in liquidation v. D. H. Delacroix. On third opposition of Mrs. Stephanie de Livaudais, wife of D. H. Delacroix, 584.

2. Before the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council

CONSTITUTION—Continued.

which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void.

City of Shreveport v. L. A. Levy, 671.

3. The constitutionality of that provision, making the decision of said board of assessors final as to "the valuations in the assessment rolls," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised.

State of Louisiana v. Widow J. C. de St. Romes, 753.

SEE TAXES AND TAX COLLECTORS, No. 24—*State v. Ray*, 674.

No. 29—*Morrison v. Larkin*, 699.

No. 30—*City of Shreveport v. Jones*, 708.

CONFISCATION ACT.

SEE LAWS AND STATUTES, No. 22—*Micou v. Benjamin and Day*, 718.

CONTRACT.

1. Where a contract has for its consideration an illegal currency reprobated by law, the plaintiff suing on that contract can not recover.

Jacob Denney v. L. L. Johnson, 55.

2. A large lot of furniture having been sold by plaintiff to defendant, for which part payment has been made to a considerable amount, plaintiff sues for the balance due on the same or for the restoration of the property. Defendant, avowing her own infamy, maintains that she is not bound by a contract *contra bonos mores*, as it was to the knowledge of plaintiff that the furniture was bought for the purpose of keeping a house of prostitution. The defense can not be accepted. The knowledge of the plaintiff of the immoral use for which the furniture was purchased did not violate the contract.

Eliza V. Mahood v. Ida T. Tealza, Wife, et al., 108.

3. In March, 1862, plaintiff and defendant entered into partnership by written agreement to transact an importing business, principally between certain ports in Europe and the Island of Cuba, the profits and losses to be equally divided between them. The partnership was to be continued during the year, and went into operation according to agreement. After the war, Wallis sues for one-half of a certain amount of partnership property remaining in the hands of defendant. The defense is that the contract was entered into with the view of running the blockade, and is therefore null and void, its object being an illicit one.

This court sees nothing illicit in the contract itself, and does not think that the defendant has shown that the partnership funds which came into his hands were the result of an unlawful traffic.

John S. Wallis v. E. B. Wheelock, 246.

CONTRACT—Continued.

4. Defendant's refusal to fulfill a certain agreement with the Citizens' Bank in relation to the sale of a plantation to said defendant, on the alleged ground of an error of fact in the agreement, can not avail him.

Error is said to be the greatest defect that can occur in a contract, but the error must be in respect to the object of the agreement, the identity or quality of the subject. That is called error of fact which proceeds either from ignorance of that which really exists or from a mistaken belief in the existence of that which has none.

In this case the error as to the value of the property which defendant agreed to buy, was no error of fact, but if it existed an error of judgment. This is an error for which the law furnishes no relief. Besides, certain allegations of the defendant in reconvening for damages resulting from the pretended noncompliance of the bank with its allegations, contradict his own allegations as to his error about the value of the property.

It is not in the power of this court to force defendant to comply with his contract. The penalty he incurs for violating it, is the damage he has occasioned.

Citizens' Bank of Louisiana v. Clarence L. James, 264.

5. Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. This court is not satisfied that he was employed by the year. Besides, on his being paid for the time he worked at the rate of \$1500 per annum, he took the money without objection. *Victor Tanner v. S. Cambon*, 353.

6. This case originating in the dismissal of the employe by the employer is governed by article 2749 of the Civil Code.

William J. Taylor v. Kehlor, Updike & Co., 369.

7. The plaintiff employed defendant to construct a house for him according to contract. Defendant, before completing the work abandoned it and left the State. Having put defendant *in mora*, plaintiff employed other workmen to complete the job at the expense of defendant. There are various claims by material men for materials furnished to the contractor and used in erecting plaintiff's building, who has instituted this action to avoid a multiplicity of suits and bring together the various claimants *in concursu* for the purpose of having their rights and privileges adjusted, and to have the sum of \$527 deposited by him in court distributed pro rata among the several parties—said amount being the balance due, as he represents, to the defendant under the contract, and which should go pro rata towards paying the material men their claims, for which he alleges that defendant is bound.

This court is satisfied that the claims of certain of the material men

CONTRACT—Continued.

in whose favor judgment was given against O'Hern personally, were debts contracted by Gouldy, against whom the bills were made out; that credit was given for the materials to the contractor Gouldy, and not to O'Hern, the owner of the lot. Therefore the alleged promise of plaintiff to pay these claims can not be proved by parol. There is no ground for a personal judgment against the plaintiff for the amount of those claims.

William O'Hern v. A. B. Gouldy et als., 371.

8. The jurisprudence of this State is settled upon the point of the slave consideration in contracts, and this court will not disturb it.

William J. McLean v. A. Foster Elliot et als., 385.

9. The managers of defendant's business, during his absence, had employed the plaintiff as clerk in his store, at the rate of two thousand dollars per annum, to begin on the first day of March, 1870, with a proviso that, if his services were not found satisfactory by defendant, the engagement would be canceled on the first day of April, on paying to plaintiff one hundred and fifty dollars for his services in March. This contract was to be ratified by defendant, then absent. He returned on the thirteenth of April, and on the twenty-fifth of the same month, he discharged the plaintiff, whose claim under the contract is the object of the present suit.

If the managers of defendant's business had no authority to employ plaintiff, their act should have been repudiated immediately. It was unfortunate for defendant, if his agents failed to give him correct information of the contract, but it was not plaintiff's fault. Besides, when defendant returned to his store on the thirteenth of April, and found the plaintiff employed as clerk, it was his duty to inquire concerning the terms upon which his agents had engaged his services. Nothing of the kind, however, was done by him, until he concluded to discharge plaintiff on the twenty-fifth of April. His silence from early in March till the twenty-fifth of April, must be regarded as a tacit acceptance of the employment of plaintiff.

John P. Stagg v. F. Bolden, 455.

10. A certain sum was deposited in the hands of Rogers by Mrs. Williams to induce him to sign a bond for the release of her husband, who was prosecuted for the embezzlement of funds belonging to Ponder—which money thus deposited Rogers was to return to her or to her order as soon as he became released from his bond. The prosecution was discontinued, the release from the bond was thereby effected, and an assignment of the funds deposited was made by Mrs. Williams to the plaintiffs, who sued Rogers on his refusal to pay the same.

CONTRACT—Continued.

Such an agreement on the part of the prosecuting witness, one of the plaintiffs, is one which a court of justice should not recognize and enforce. The agreement was that if the money embezzled should be returned, he would not prosecute the offender. This can not be the basis of an action in a court of justice to compel one of the contracting parties to comply with the contract; and, as set out in the petition, the demand of the counsel of the accused is so connected with this illegal contract, that it can not be granted.

The plaintiffs had a legal remedy by which their civil demand against the defendants could have been enforced. The action here is not against the depository on the simple assignment of the depositor; for both the depositor and the depository are sued *in solido*, and the effect of the suit is to enforce the consideration for the discontinuance of the prosecution.

A. P. Field and Jesse R. Ponder v. W. N. Rogers et als., 574.

11. A contract made in bad faith can not be rescinded unless it operate to the injury of the party complaining. A sale may be fraudulent and simulated, and yet not injure the complaining creditor.

Marcellin Gillis v. J. D. Dansby et al., 711.

SEE MORTGAGE, No. 4—*Fleitas v. Consolidated Association of Planters of Louisiana et als.*, 223.

SEE BONDS, No. 12—*Clements v. Biossat et als.*, 243.

SEE DAMAGES, No. 1, 2—*Campbell v. Miltenberger*, 72.

SEE EVIDENCE, No. 26—*Burbank v. Pierce*, 295.

SEE TAXES AND TAX COLLECTOR, No. 10—*Barthel v. city of New Orleans*, 340.

SEE INSURANCE, No. 9—*Pike v. Merchants' Mutual Insurance Company*, 392.

SEE NEW ORLEANS, No. 5—*Coleman v. City of New Orleans*, 451.

SEE SUCCESSION, No. 2—*Netter v. Herman and Levy*, 458.

SEE EVIDENCE, No. 33—*Billgery v. Schnell and Joachim*, 467.

SEE LEASE, No. 5—*Trisconi v. Dumas & Victor*, 477.

SEE BANQUETTES, No. 2—*O'Hara v. Krantz*, 504.

SEE CORPORATIONS, No. 8—*Eddy v. City of Shreveport*, 636.

SEE SUCCESSION, No. 3—*Pool v. Mrs. Alexander and Husband*, 669.

CORPORATIONS.

1. The officer of a company must be presumed to know its by-laws adopted before his appointment, and is bound by them as to his tenure of office. They have become the law between himself and his employers. By one of their by-laws the defendants had reserved the right to remove their officers at pleasure. Plaintiff is an officer in the sense of the said by-law, and therefore can not complain.

George W. Hunter v. The Sun Mutual Insurance Company of New Orleans, 13.

CORPORATIONS—Continued.

2. It has been frequently determined that police jurors are political corporations whose powers are specially defined by the Legislature, and that they can legally exercise no other powers than those delegated to them.

For all purposes for which they are by law authorized to create debts, they are authorized to levy and collect a tax for paying the same. But, without a special grant of power by the Legislature for that purpose, they clearly have no authority to issue and put in circulation instruments of any kind.

Stephen C. Sterling v. Parish of West Feliciana, 59.

3. No special statute is shown in this case conferring upon the parish of West Feliciana the authority to issue the negotiable notes or warrants upon which the plaintiff sues.

The position that the warrants or negotiable instruments of indebtedness which are the objects of this suit, were issued to defray the necessary expenses of the parish is not tenable. The police jury was not authorized to do it in any other way than by levying and collecting a tax for that purpose. Said negotiable instruments are null and void. *Ibid.*

4. The important question in this case is: Has act No. 77, of the legislative session of 1870, entitled "An Act to authorize the stockholders of the Loan and Pledge Association" to change the name of the incorporation, and to grant certain privileges to said association, been properly accepted?

The answer must be in the negative. The acceptance of an act which fundamentally changed the character of the institution, should have been by the unanimous consent of the stockholders. The assent which was given by a majority is not sufficient.

Legislative alterations of the charter of a private corporation, when merely auxiliary and not fundamental, may be adopted by a majority of the corporators, and such acceptance will bind the whole; but if such alterations be fundamental, the acceptance must be unanimous.

State ex rel. Attorney General v. Accommodation Bank of Louisiana, 288.

5. A municipal corporation possesses two classes of powers and two classes of rights—public and private. In all that relates to one class, it is merely the agent of the State and subject to its control. In the other, it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature—its creator. Among this latter class is the right to acquire, hold and dispose of property—to sue and be sued, etc.—just as certain rights

CORPORATIONS—Continued.

are conferred on private corporations and persons, not *sui juris*, such as minors and married women, but are not afterwards, as long as they exist, under the control of the Legislature.

A municipal corporation may own property, to and over which the Legislature has, while said corporation exists no right or control in opposition to or independently of the will or consent of the corporation.

It is a manifest fact to all that the incorporation of such a city as New Orleans is a necessity. The multiplying and complicated interests of the compact and increasing community are such that the Legislature can not administer them; and some of them are of such a nature as not to be within mere legislative action, but are to be conducted under general rules, thus necessitating the creation of an intellectual body, with something more than governmental functions, but which do not constitute an *imperium in imperio*.

If then a municipal corporation can acquire the fee simple of property, the squares intended for the depots of the plaintiffs were so acquired, and they can not be taken by the Legislature, while the city corporation exists.

The Legislature expressly recognized and ratified the compromise of September, 1820, between the city and certain riparian proprietors in relation to the property in question, imposing conditions which were complied with. The theory that the city acquired the property simply as the agent of the State can not be accepted, because the city can own private property, and because the former owners intended to, and did, by the act of twentieth June, 1851, transfer the title thereof to the city, subject only to the uses of commerce and of the public, while so needed.

The injunction in this instance was improperly issued against the defendant—the city of New Orleans—but as the city has made no claim against the plaintiffs, a demand in reconvention can not be admitted, and a decree inhibiting the plaintiffs from occupying the property in controversy could not be granted.

Under the pleadings, all that can be done is to render judgment in favor of the city dissolving the injunction and dismissing plaintiffs' suit, leaving the parties to their rights, under the laws relative to the expropriation of property.

New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans et als. Charles Morgan, Intervenor, 478.

6. The plaintiffs sue on an open account to recover salaries as Commissioners of Waterworks, and commissions on two millions of dollars for adjusting and settling the accounts between the Commercial Bank and the City of New Orleans.

CORPORATIONS—Continued.

On the thirty-first of July, 1868, the resolution which authorized the appointment of the plaintiffs was adopted. Neither that resolution nor any other resolution, law, ordinance or contract fixed any salary or compensation for the services of said commissioners. None, therefore, can be claimed. There is no implied obligation on the part of the municipal corporations, and no such relation between them and the officers whom they are required by law to select, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law, ordinance or contract. *A. W. Bosworth et als. v. City of New Orleans*, 494.

7. If the Claiborne Manufacturing Company was insolvent when Nicholson, one of the defendants, obtained his judgment, which is now sought to be annulled, it does not appear that he knew it. Had he known it, there was no reason why he should not have prosecuted his claim. The board of directors had expressly authorized the president of the company to confess judgment in Nicholson's favor. This they had the authority in law to do.

Thomas B. Killgore v. M. P. Nicholson et als., 633.

8. The City Council of the city of Shreveport having under its charter the right to purchase property, had the right to secure the credit portion of the price by stipulating a mortgage and the vendor's privilege on the property purchased in favor of each vendor and agreeing not to prejudice the right of mortgage and privilege by any alienation or incumbrance, and to pay the costs or fees incurred by the vendors in enforcing their rights thus preserved. These were all incidents of the contract of sale.

The very fact that the city purchased the property for the purpose of donating it to the Texas and Pacific Railroad Company for their *depots*, made it the more prudent in the vendors to require the pact *de non alienando*, and militates against the presumption of their consenting to waive it.

If there could be any doubt about the authority of the mayor to represent the city in those sales, and to make the stipulations referred to, his acts were ratified by the acceptance of the transfers and the donation of the purchased property to the railroad company, in which the several acts of sale were referred to.

The attempted exclusion in this act of donation, of any intention to ratify the onerous stipulations under consideration, was without effect against the vendors. The contract of sale as a whole was ratified.

C. O. Edey v. City of Shreveport. Gregg & Ford v. The same. Steers & Carlton v. Same. S. B. Steers v. Same. W. Johnston & Co. v. Same. (Consolidated cases.), 636.

CORPORATIONS—Continued.

9. The objection to the testimony of a witness on the ground that it could not be introduced to establish a fact which could only be shown by the minutes themselves of a corporation, was not well taken. It has been determined that the neglect, incompetence, not to say dishonesty of a corporation in making up its minutes, can not exclude an interested third party from proving the truth by parol.

In this instance it is clear that the act of executing the note sued upon was ratified by the vestry, and it is unimportant whether, at the time of executing it, the persons who did so had a special authorization or not.

Charles Donnelly v. St. John's Protestant Episcopal Church, 738.

SEE GARNISHMENT AND GARNISHEES, No. 4—*Smith v. Durbridge and Crescent City Live Stock Landing and Slaughterhouse Company*, 531.

SEE EVIDENCE, No. 46—*Kilgore v. Willis et al.*, 665.

SEE TAXES AND TAX COLLECTORS, No. 24—*Slack v. Ray*, 674.

No. 30—*City of Shreveport v. Jones*, 708.

COURTS.

1. The same reason upon which the power of the Legislature rests to increase the number of courts in New Orleans, exists for the power it possesses to decrease the number.

Article 83 of the constitution of 1868 announces that the General Assembly may establish in New Orleans as many district courts as the public interests may require, wholly irrespective of any particular number of courts. It may diminish or increase that number according to its discretion.

If it be granted that article 83 of the constitution must be considered and interpreted in connection with the other articles of the same instrument on the same subject matter, to wit: articles 81, 84, 97, 110, 122 and 158, it is important not to overlook that article 83, so far as relates to the organization of the district courts of New Orleans, is express and special. It is a well recognized rule that general legislation does not control special legislation on the same subject matter.

All those articles which treat of district courts, tenure of office, removal of judges, etc., as a general subject, must be subordinated to article 83, so far as their provisions are in conflict or inconsistent with the special provisions of article 83, in relation to the district courts of New Orleans. By this rule it is possible to harmonize, and give effect to, each and every one of the articles that have been enumerated, instead of becoming bewildered in a labyrinth of difficulties, vainly endeavoring to limit and circum-

COURTS—Continued.

scribe the special provisions of article 83, by giving a controlling power over them to the general provisions of the other articles.

The abolishment of the court over which the relator presided was a legislative act, which the General Assembly of Louisiana had the constitutional power and right to perform. That act was not an *ex post facto* law. There was no obligation or contract violated. It was simply the exercise of a power and discretion with which the General Assembly was clothed before and at the time the relator came into office.

State ex rel. T. Wharton Collins v. Charles Clinton, Auditor, 406.

SEE JURISDICTION, No. 1—*Louis Parker v. Shropshire & Anderson*, 37.

SEE OFFICE AND OFFICERS, No. 1, 2—*Thos. Lynne v. City of New Orleans*, 48.

CRIMINAL LAW.

1. The indictment for perjury in this case is fatally defective. It does not charge that the question which the defendant is alleged to have answered falsely was material to the case then being examined by the grand jury. It does not set forth the substance of the offense; nor charge that the defendant willfully made oath to a statement of material fact, which statement was false.

State of Louisiana v. Henry Gibson, 71.

2. The judge *a quo* was right when he refused a continuance in order that the prisoners might obtain testimony from Europe to establish the fact that the man alleged to have been murdered was the nephew of one of the accused. The relationship of the parties has nothing to do with the guilt or innocence of the accused.

The State of Louisiana v. Didio Baptiste and Francis Martini, 134.

3. The judge did not err when he ordered that the witnesses for the State and the prisoners be separated, except the physicians. Dr. Jackson, being the coroner, was called to testify as such; Dr. Bemiss and Dr. Beard, being required as medical experts as to the cause of death were permitted to remain to hear the evidence in order that they might form an opinion as to the cause of death.

Ibid.

4. The court *a qua* did not err in permitting Ward to testify as a witness. The objection was that he had been found guilty of two crimes, and had been sentenced to the penitentiary and to the parish prison; that he had been pardoned after his sentence had been completed; and that his pardon was not sufficiently proved.

Ibid.

5. It matters not whether the pardon came before or after the term of confinement had expired. There are disabilities which are the

CRIMINAL LAW—Continued.

consequences of conviction, and remain after incarceration has ceased. The doctrine well recognized on this subject is, that a pardon gives to the person to whom it is granted a new character, and makes of him a new man. When extended to him in prison, it releases him and removes his disabilities; when given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities. *Ibid.*

6. A communication from the Secretary of the Senate to the Acting Governor, informing him that his recommendation for pardon had been received, and that it had been acted upon favorably, is sufficient evidence of the completeness of the pardon. *Ibid.*

7. The judge *a quo* did not err in permitting the physicians, as professional experts, to recapitulate to the jury the evidence they had heard, and which constituted the reason and foundation for their opinions in relation to the mode of death of the deceased.

The objection that they were physicians in the employ of two insurance offices which had each a policy on the life of the deceased, may go to their credibility, but does not make improper their answers to the questions propounded. *Ibid.*

8. The jury, after being two days and two nights deliberating on their verdict, came into court, and through their foreman asked the court for further instructions as to the weight to be given to circumstantial evidence; and the court having briefly charged the jury that they were bound to act on circumstantial evidence as much as on any other evidence, and being about to send back the jury to the room for further deliberations, the counsel for defendants asked the court to give the jury a more explicit charge as to the character of the circumstantial evidence which was entitled to consideration by them. The court interrupted the counsel, and absolutely refused to hear what he had to say, or even to permit him to address the court upon the right of asking for additional charges on the particular information wanted by the jury.

On this point it is obvious that the judge *a quo* erred, and that he refused to the prisoners a most important, and, in this instance, vital right. *Ibid.*

9. The objection that the proceeding by information against the defendant was illegal on the ground that it was violative of the fifth article of the Constitution of the United States which declares—“That no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury,” is not well taken. The provisions of the Constitution of the United States in relation to trials by jury apply only to the Federal courts. *State of Louisiana v. Frank Carro, 377.*

CRIMINAL LAW—Continued.

10. The charge in the indictment that the defendant did feloniously and violently seize, take and carry away, etc., "the sum of one hundred dollars in paper currency of the United States of America, of the goods, property and chattels of," etc., is sufficient. It is a substantial compliance with the provisions of the statute. Revised Statutes, section 1061. *Ibid.*
11. The objection that the name of one C. R. Schaffer is indorsed on the verdict as foreman of the jury, when it does not appear elsewhere that a man of that name served upon the jury, is without weight. The name of C. A. Shaffer appears on the list of jurors who sat on the trial. The discrepancy in the letter of the middle name is clearly a clerical error. *Ibid.*
12. The point in this case is, that the judge erred in refusing a new trial on the showing made that one of the jurors was a British subject, and therefore incompetent to sit at the trial.

The record contains no mention of the reason of the judge for refusing the application for a new trial—whether because he found the fact not satisfactorily established, or whether, as a question of law, the defendant was not entitled to it—conceding the fact to be satisfactorily proved.

If the finding of the judge *a quo* was based on a question of fact, it can not be revised by this court; because, in criminal cases, only questions of law are corrigible by this tribunal. But assuming that the finding of the judge in refusing a new trial was upon a question of law, the conclusion of this court is that he was correct.

The defendant, duly served with a list of the jurors by whom it was proposed that he should be tried, had ample opportunity to consider any objection he might have to their capacity or competency, and he should have made whatever objection he had at the time each juror was offered.

In his affidavit for a new trial, the defendant states that he did not know the fact of which he complains till after the trial. If he neglected to ask the juror at the time he was offered whether he was a citizen or not, it was a neglect of which he can not now complain. *State of Louisiana v. William L. Bower*, 383.

13. The defendant alleges that the words "paper currency of the United States," do not describe the statutory offense of robbery.

The charge in the indictment is the felonious and violent taking of "the sum of seventeen hundred and forty-five dollars in paper currency of the United States of America." This comes within the law. R. S. sec. 810.

The objection that the words "promissory note of the value of three hundred dollars," do not conform to the statute, because not

CRIMINAL LAW—Continued.

showing that it was for the payment of any specific property, is not well founded.

Section 1051 makes it sufficient to describe "the instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac simile* of the whole or any part of such instrument, matter or thing."

This law, as stated in 10 An. 230, cited by defendant, is an exception to the general rule of the common law as to description, and is complied with in the indictment here.

The defendant's bill of exceptions to the refusal of the judge to grant a continuance to enable the counsel appointed to represent him to prepare the defense, can not be maintained. It seems there were three days between the appointment and the trial. This is sufficient time when no special cause is shown for longer delay, nor is such a delay essential in itself.

No law authorizes to move for attachments against absent jurors on the list, in order to bring a greater number, when there are enough present to complete the panel. It is a matter in the judge's discretion; and the non-attendance of some of the jurors summoned and not excused, is not good cause for refusal to go to trial.

The judge *a quo* did not err when refusing to admit an affidavit against the wife of the defendant, charging her with receiving stolen property, being a part of the property described in the indictment. It was introducing a new issue from the one at the bar.

State of Louisiana v. O. H. Shonhausen, 421.

14. There was no error in refusing to allow the defendant to propound to his own witness certain questions which are specified in his bill of exceptions. If intended to impeach the witness, they were not allowable to the party introducing him. Otherwise, they were irrelevant to the issue.

The court instructed the jury in the general charge that: "To constitute robbery there should be actual or constructive force." This was correct, and substantially what the counsel asked.

The court was also asked to charge that, "in the proof of taking, it is necessary to show that the goods were actually in the possession of the accused." The court, in giving the charge, added the words, "or constructively" after the word "actually" and before the word "in." There was no error in this.

The bill of exceptions to permitting a witness to refer to his books, out of the presence of the court, in order to refresh his memory, was not well taken.

The jury found the accused guilty of robbery and larceny on the indictment containing the two counts, and hereupon, on motion of

CRIMINAL LAW—Continued.

the Attorney General, a *nolle prosequi* was entered on the second count as to larceny, and the accused was discharged therefrom. There is no error in this proceeding. *Ibid.*

15. The offense for which the accused was tried is not prescribed, because the indictment was not filed within a year after the crime had been committed. The statute merely says that the indictment must be found within a year after the offense was made known to the public officer having power to direct investigation and prosecution.

The law does not say that, because the foreman of a grand jury can not write his name, the indictment found by the grand jury of which he is foreman shall not be good.

After a motion for a new trial which has been refused, it is too late to urge in arrest of judgment that the jury were guilty of misconduct, partiality and prejudice against the accused.

The judge *a quo* did not err in refusing to permit the introduction in evidence of the certificate of the *post mortem* examination given by the physician who made it. There is nothing to show that the physician himself could not have been procured. His testimony, if it could be obtained, was the evidence required, and not his certificate. *State of Louisiana v. E. B. Tinney*, 460.

16. The ruling of the judge admitting the voluntary confessions of Fontaine made to the witnesses, who happened to be a constable and a justice of the peace, as against himself, was correct. But the declarations of Fontaine were inadmissible against Monie, and the judge should have instructed the jury to limit the application of said admissions to Fontaine alone.

State of Louisiana v. Theophile Monie and Joseph Fontaine, 513.

17. The refusal of the judge to order the separation of the witnesses is a matter within his sound discretion.

The judge *a quo* was correct in refusing to charge that, "if from the nature of the assault, Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife and was at the time of the killing being inflicted upon her person, then the killing was in self defense." This would have required the judge to assume the fact that the assault upon his wife was without provocation, for if the wife was the aggressor, the killing would not be excusable in self defense.

The judge *a quo* did not err when he refused to charge the jury, "that they must take into consideration the crippled condition of the accused." The cripple was not assaulted, and his being a cripple did not give him any greater right to kill one who assaulted his wife, than other men possess.

CRIMINAL LAW—Continued.

There was no error in the charge of the judge *a quo* that the principle decided in the case of Selfridge by the Supreme Court, "was the law of Louisiana, whenever there is any application to the case."

The judge *a quo* correctly refused to charge, in regard to the dying declarations of the deceased, "that the statement must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented from any cause from making, they will not be received." The defendant's counsel did not object to the admission of said declarations, but on the contrary used them, and referred to them as evidence in the argument before the jury.

State of Louisiana v. E. A. Giroux and C. Giroux, 582.

18. The prisoner requested the judge to reduce his charge to the jury to writing. This he refused to do. The request was made before the charge was delivered. To the judge's refusal a bill of exception was taken. The exception must be sustained.

The State of Louisiana v. John J. Gilmore, 599.

19. The absence of part of the jurors at the time and when the case was called for trial, in no manner deprived the defendants of the opportunity of inquiring into the character and qualifications of the jurors. A sufficient number of jurors being present to form the panel, the court did not err in ruling the defendants to trial.

Having had all the notice the law requires in order to prepare their challenges, the defendants were not entitled to a postponement of the trial, because all the jurors summoned for the term were not present.

The State of Louisiana v. William Hoozer et als., 599.

20. Where the appearance bond by the defendant in a criminal prosecution was taken and approved by the parish judge before whom the preliminary examination was had, the fact that there is no order committing the defendant for trial before the district court, nor any order admitting him to bail, nor fixing the amount of the bail, can not avail in assignment of error.

Where it is manifest in the record that the word August is written by mistake for July, it is a mere clerical error which is controlled by the context and accompanying documents.

While the court was in session, the fact that the petit jury and witnesses in criminal matters were discharged for two or three days at a time, on different occasions during the said term, did not release the defendant from the obligation of his appearance bond.

State of Louisiana v. Sosthene Herpin, 612.

CRIMINAL LAW—Continued.

The verbal admission of the accused ought always to be received with great caution. Besides, it is a rule of evidence that the whole admission is to be taken together. In this case the witness only heard part of it. The evidence should have been rejected.

The State of Louisiana v. Eli Gilcrease, 622.

SEE JURIES AND JURORS, No. 3, 4—*State of Louisiana v. Austin E. Smith, 62.*

SEE JURIES AND JURORS, No. 5—*State of Louisiana v. Gastano Rosa and Rosa Rosa, 75.*

DAMAGES.

1. The plaintiff knew, as a chemist, that his iron fence, for which he had contracted with defendant, was joined together with material which would necessarily go to ruin, and he saw the ruin commencing within a year after the work was completed. It was then that he should have compelled the defendant to do his work in a proper manner.

It is not sufficient that plaintiff should have repeatedly called the defendant's attention to the bad condition of the fence; he should, as he could, have forced him to a compliance with his contract, and should not have waited seven years to claim, as damages, a greater amount than the fence originally cost. He is only entitled to recover from the defendant the amount which it would have cost to put the fence in a proper condition when it was first discovered that the material used was not suitable for the purpose for which it was intended.

Geo. W. Campbell v. C. A. Miltenberger, 72.

2. The prescription of one year is not applicable to this case. It applies only to cases arising from damages caused by the commission of an offense or *quasi* offense. *Ibid.*
3. Mere words spoken, however much they may be calculated to excite and irritate, do not justify an assault and battery. The law, in deference to human infirmities, concedes something in favor of an accused party, where it is shown there was great provocation, and in civil actions such provocation may go in mitigation of damages but never in justification of the unlawful act.

Josiah B. Richardson v. James E. Zuntz, 313.

4. Plaintiffs, judgment creditors of Canale, caused their execution to be levied on certain movables. Mora enjoined the sale, claiming to be the owner of the property seized. The injunction was dissolved in the court below, and the judgment was affirmed in this court with twenty per cent. damages against the principal and surety *in solido*. Pending the appeal, the sheriff improperly released the seizure, and Mora sold the property at auction.

DAMAGES—Continued.

Plaintiffs bring this suit for damages resulting from the illegal release of the seizure by the sheriff and from the improper injunction by Mora, and pray judgment against them *in solido* for the amount of their judgment against Canale, which they failed to realize by reason of the illegal acts of the sheriff and Mora. The sheriff calls in warranty Mora and the sureties on his injunction bond.

It is not possible to discover what obligation Mora and his surety have contracted towards the plaintiffs. This suit is not on the injunction bond. The injunction was dissolved, and with damages granted to plaintiffs against the principal and surety *in solido*. The illegal release by the sheriff accrued subsequently to the injunction, and did not result necessarily from the exercise of that writ. That Mora disposed of a judgment debtor's property, after it had been released from seizure, did not create a legal obligation against him in favor of the judgment creditor of the party whose property he had disposed of.

There is also no legal obligation to be enforced under the call in warranty. The principal and surety on the injunction bond did not contract to warrant the sheriff against the consequences of his own illegal acts.

Oohen & Wilson v. George W. Avery et als., 359.

5. If the defendant Harispe is responsible to the plaintiff, it is because his agent took possession of plaintiff's property and shipped part of it to Cuba on Harispe's account, and part of it to Harispe at New Orleans. If this possession was a wrongful one, as it is alleged to be, the property came into his hands by reason of an offense which he, through his agent, had committed. His obligation towards the plaintiff would rest upon a claim for damages caused by tortious conduct and is the result of an offense which is prescribed by one year. The prescription invoked in this court by the defendant must therefore prevail.

George Wood v. Charles Harispe, 511.

6. The simple allegation that the acts complained of will cause the plaintiffs damage to the amount of more than five hundred dollars does not show such interest as to give this court jurisdiction.

T. S. Dugan et al. v. Police Jury of the Parish of St. Charles et als., 673.

7. Damages are considered an equivalent for the loss sustained by the delay consequent on the appeal. Hence no damages can be awarded when it does not appear that an appeal delayed plaintiff in executing or collecting his judgment.

Elizabeth Crofts v. Jeremiah Moynihan and Patrick Irwin, 727.

DAMAGES—Continued.

8. This is a suit against the defendants, Mayor and Aldermen of the city of Jefferson, for damages resulting from the infliction of a wound on plaintiff by a mob of rioters composed, in part at least, of the police of the city of Jefferson officially appointed by defendants;

Held—That as it is not alleged that defendants were present, aiding, abetting the so-called rioters, or that they, or either of them, inflicted the wound, which is the basis of plaintiff's claim, there is no cause of action. *John Spalding v. J. J. Kroider et als.*, 743.

DOMICILE

1. In view of the facts detailed by plaintiff himself, showing that he and his family, departing from New Orleans where his usual residence used to be, lived and resided during the war within the Confederate lines, it is evident that plaintiff did not reside in New Orleans on the sixth of April, 1863, the time of the protest of the note on which he appears as indorser, and that, as he had no known place of residence, the notice deposited for him by the notary in the postoffice, pursuant to the act of 1855, was sufficient to fix his liability. *Samuel Jamison v. J. H. Pothaus et als.*, 63.
2. Besides, the plaintiff, on the ground that he did not know he was legally released by the want of notice, can not be permitted to recover the sum which he voluntarily paid as a compromise for a larger sum claimed of him. He preferred to pay this sum to the hope of gaining, balanced by the danger of losing the law suit which the defendants were about to bring against him. The settlement or transaction has a force equal to the authority of the thing adjudged. *Ibid.*

SEE JURISDICTION, No. 12—*Bradley & Co. v. Woodruff et al.*, 299.

SEE WILLS AND TESTAMENTS, No. 2, 3, 4—*Rongger v. Kissinger*, 338.

SEE DOMICILE, No. 32—*Stephenson v. Broadwell*, 387.

SEE TAXES AND TAX COLLECTORS, No. 11—*Mrs. George v. Campbell*, 445.

SEE SHERIFF, No. 4—*Rau v. Katz et al.*, 463.

SEE INJUNCTION, No. 16—*Butchers' Benevolent Association v. R. King Cutler*, 500.

SEE OBLIGATIONS AND LIABILITIES, No. 4—*Wilson v. Benjamin et als.*, 587.

DONATIONS.

1. It is sufficiently clear from the tenor of the will on record, that the testator had the desire to give the seizin to the executrix. Any disposition or recommendation from the testator to his executor in regard to the mode in which his property is to be administered is

DONATIONS—Continued.

a sufficient indication of his desire to grant the seizin. It is not necessary that the word seizin be inserted in the will to confer the power.

The executrix is entitled to credit for interest paid to procure extensions of mortgage notes, it not being shown that she had moneys in hand sufficient for the purpose of taking up the notes of the deceased when the renewals were made. It was important to the interest of the estate that they should be taken up.

The sum of \$21,500 reported by the auditor in this instance, as amount of sales of property of the separate estate of the deceased during his last marriage and charged against his widow, was properly rejected by the court below, as there is no evidence to show that the proceeds of that property inured to the benefit of the community.

It is expressly announced by article 1749 of the Civil Code that "all donations made between married persons, during marriage, though termed *inter vivos*, shall always be revocable." The restoration by the wife to the husband of the various articles donated to her and the subsequent conversion of them by him for the uses and benefit of the community may be regarded as a revocation or an annulment of the donation.

Succession of Thomas Hale—On opposition to account of Executrix, 195.

2. Apart from the disability of the husband and wife to enter into a contract with each other, except when the law expressly permits it, the promise or engagement of the husband to return to his wife the value of the articles donated back to him, by replacing them with others of the same kind and of the like value, could only be regarded as an imperfect obligation at best, and one that can not be enforced by law. It did not have the binding force of a legal obligation against the husband and neither can it have against his heirs.

A donation made in money, in the form of the manual gift, is valid without the formality of a notarial act of transfer.

There is no foundation for the assertion that the provisions of article 1749 apply to donations by public act and not to manual gifts which require no formalities after delivery. This court is unable to discover in our code any exception to the rule laid down in article 1749.

It is contended that, if by the act of donation from the husband, the money became hers absolutely, then by operation of law, article 1753 of the Civil Code, the ownership of said money changed, and was vested in the heirs in consequence of the wife's second mar-

DONATIONS—Continued.

riage. The court thinks that articles 1746, 1750 and 1752 must be construed together with article 1753, to which latter article the three former ones are subordinated, and that their operation is contingent upon the conditions expressed in the article 1753, which is not found in the Napoleon Code, but which was incorporated into our system of laws from the Roman law and Spanish Codes.

Ibid.

3. The attitude of the parties to this litigation would seem to present a case provided for by the article 1753 of our Code. During the marriage large and valuable donations were made by the husband to the wife in the form of the manual gift. The husband died, leaving children by his marriage with the donee, who has contracted a second marriage, the children of the donor still living. But in this case the conclusion of the court is that the provisions of article 1753 can not be enforced, for the reason that the substance of the donation is no longer tangible nor susceptible of identification. The property, of which the ownership, under such circumstances, becomes vested in the children, must be the same property that was donated to the wife by the husband during the marriage.

In this case, the money constituting the particular donation under consideration, has long since been used by the executrix, the donee, for the benefit of herself and family. It is no longer *in esse* as to the rights of the opponents. The ownership of it can not be enjoyed by the children nor the usufruct of it by the mother. Hence the executrix can not be held liable for it. *Ibid.*

4. Plaintiff, revoking the donation which he made to his wife of a certain piece of property, seeks to recover possession of said property from defendant, whose title is derived from plaintiff's wife under the donation aforesaid.

It appears that Mrs. Wade desired to donate the property in question, thus donated to her, to her daughter, Mrs. Eames, "as an extra portion over and above her legitimate share in the succession of said donor," estimating it at \$7000, and to secure the title it was specially stipulated in the act, "that the said donor binds herself and her heirs to warrant and forever defend the said property against all legal claims and demands whatsoever." To this act the plaintiff was a party, approving of it and authorizing his wife. He is therefore estopped from disputing the title of defendant.

Besides, the prescription of ten years invoked by defendant, is a complete bar to the action.

Henry F. Wade v. David W. Eames, 449.

SEE MORTGAGE, No. 6—*Succession of Cordevielle v. Dawson, 534.*

DRAINAGE.

1. It is impossible to consent to the proposition that, because private property may not be in use by the owner, it may be violently and illegally taken from him by another, with the view even of subserving the interest of said owners.

Canal and Carondelet Navigation Company v. Commissioners of First Drainage District of New Orleans, 740.

SEE NEW ORLEANS, No. 2—*State ex rel. Gagnet v. Administrator of Public Accounts*, 336.

ESTOPPEL.

1. Plaintiff, after having accepted the benefit and status conferred upon him by Pierre Monette in the act of marriage which legitimated him, can not attack the act creating his own status, and under which he is asserting his rights, by questioning the validity of the same rights conferred upon one who is recognized as his brother and also legitimated in the same document. The very words which establish the legitimacy of plaintiff, establish also the status of the defendant. He can not accept the benefits of an act and repudiate its obligations.

Succession of Pierre Monette, 26.

2. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

3. The plaintiff, being ejected from his office of mayor of the city of Jefferson from the first of June, 1869, to the first of April, 1870, when the office ceased to exist by annexation of said city to the city of New Orleans, obtained by compromise, in a suit resulting from the unlawful interference with his rights, the sum of \$1500 from the party thus interfering under an appointment made by the Governor. This sum was paid out of the funds of the city of Jefferson, and the plaintiff now claims from the city of New Orleans, as successor of the city of Jefferson, the same amount for salary; Held—That the compromising by plaintiff of the said suit, in which his right to the office was involved, concludes him from urging any demand against the city of New Orleans for his salary, admitting the liability of the city to pay a salary twice for the same services.

J. J. Kreider v. City of New Orleans, 342.

4. The widow and heirs of Jean Pardo claim a house and lot, formerly belonging to A. A. Pardo, on which the deceased had a mortgage, and which, in 1858, he bought at an auction sale ordered by the

ESTOPPEL—Continued.

Second District Court under insolvent proceedings in consequence of the bankruptcy of A. A. Pardo, the defendant in this case, who was, however, permitted by the purchaser to retain possession of the property.

The defense set up that the price paid for the property was money which the deceased was owing to defendant, is utterly without foundation.

The defendant, in the face of the schedule which he filed in bankruptcy as syndic of his creditors, and which is verified by his own oath, can not be heard setting up an account against his brother extending back to 1840, eighteen years previous to his insolvency and which is not mentioned in the schedule. He is estopped from denying the truth of his oaths and judicial admissions in the insolvent proceedings.

If the account aforesaid was a valid claim, it should have been put on the schedule as an asset of the insolvent. If he colluded with his brother in suppressing this claim and allowing him to carry off the property as first mortgage creditor, this court will not aid him in seeking to derive a benefit from the fraud.

The Widow and Heirs of Jean Pardo v. A. A. Pardo, 364.

5. The judgment referred to as an estoppel against plaintiff's action, did not impose upon her the condition to claim certain pieces of property in kind, to which she might be entitled, but reserved her right to the proceeds in case she failed to recover said property. She has alleged and shown that the title of the purchasers was maintained in several suits she instituted. She therefore can exercise her second right.

The objection that the security can not be sued for the proceeds, no step having been previously taken to fix the liability of the principal, is not well founded.

This objection was not made in the lower court, but the surety adopted and joined in the defense made by the principal, and, on trial, the plaintiff showed by the returns of *nulla bona* on one or two *fiery facias* for small sums, that further process against the principal would be unavailing.

Mrs. A. E. Deblanc v. F. Levasseur et al., 541.

6. The objection to the introduction of plaintiff's testimony as a witness to prove in her own behalf that she was not a member of a certain firm, was properly sustained. If not estopped by her own declarations in an authentic act and in judicial proceedings, plaintiff's testimony could not have availed to show that she was not a member of said firm against her own solemn declarations in those instruments that she was.

Mrs. E. V. Elbert and Husband v. Wallace & Co. and J. A. Liddell, sheriff, 705.

ESTOPPEL—Continued.

7. One who has availed himself of a judgment and made it his own by issuing a *feri facias* and collecting money thereon is estopped from denying its validity.

Heirs of M. W. Ashley, deceased, v. Adam Riser et al., 711.

8. A party can not be permitted to allow his property to be sold under a judicial process and then claim the proceeds under the allegation that he did not owe the debt which the property was sold to pay.

Horatio Weedon et als. v. Arthemise Landreaux et als., 729.

SEE DONATIONS, No. 4—*Wade v. Eames*, 449.

EVIDENCE.

1. A broker who acted for both parties in a transaction, and his son, who attended to the business at his office, were both competent to testify with regard to what passed between said parties, and to prove certain conversations and statements, to which a bill of exceptions was taken, on the ground that they were made out of the presence and hearing of the parties objecting thereto.

The court does not see why a man should not be allowed to testify in a civil matter, because his testimony may show that he has been guilty of an offense against the laws of the State. This is an objection which he alone could make.

B. M. Horrell & Co. v. H. N. Parish—Louisiana National Bank, Intervenor, 6.

2. A bill of lading is, after all, only the evidence of a contract to deliver property at a certain point, and it is not the marks on the margin therein, or on the property shipped, which give life to the obligation. The marks are given only for the convenience of identification. But in this case there is no question of identity.

Ibid.

3. The burden of proof was on the plaintiff to prove, as he alleged, that the bank gave no valuable consideration for the notes; that it is not the *bona fide* holder thereof; and that they came into the possession of the bank in an illegal and unlawful manner. There was nothing in the transaction beyond the taking by the bank of security for the payment of a pre-existing debt, and this it was authorized by law to do.

Marco Giovanovich v. Citizens' Bank of Louisiana, 15.

4. Where the bill of exceptions was to the putting of leading questions by the Attorney General to one of the witnesses under the pretense that the person testifying was an unwilling witness, and without having first propounded preliminary questions to the witness, and without a refusal by the witness to answer questions propounded to her in legal form on the examination in chief, which

EVIDENCE—Continued.

was permitted by the court, and all the leading questions were answered by the witness ; and where the judge *a quo* subjoined to this statement in the bill of exceptions his own statement why he had permitted this course :

Held—That the circumstances which induced the judge *a quo* to permit the mode of interrogation used by the Attorney General constitute matter of fact which it is not necessary to examine, as upon the bill of exceptions the court thinks the ruling correct.

State of Louisiana v. Gaetano Rosa and Rosa Rosa, 75.

5. In this instance the defendant offered in evidence the petition in the case entitled "Succession of Jose Maria Caballero," and the judgment of the Second District Court and of the Supreme Court, decreeing her to be the legitimate child of the deceased. The plaintiffs objected on the ground that they were not bound by the judgment, not being parties to the suit.

The objection was correctly overruled. It was not a judgment *inter partes*, but a judgment *in rem*, and is evidence of *the facts adjudicated against the world*.

The judge *a quo* properly rejected the testimony taken by commission of witnesses not named in the interrogatories or commission. The party called on to cross question witnesses when testimony is taken by commission, is entitled to be informed of the names of the witnesses in order to know how to shape his questions.

The court below was right in not granting a continuance on the ground of the rejection of the above mentioned testimony, the party offering it not having made due diligence to get the evidence.

The plea of *res judicata* must stand. It is well settled that a final judgment of a court of competent jurisdiction as to the *status* of a person, is *res judicata* as to all the world, and the force and effect of *res judicata* is to make black white, and the crooked straight.

Gertrudis Bonella and Caballero et als. v. Charles Maduel, Testamentary Executor, et al., 112.

6. Certain blank licenses signed by the State Auditor, which were part of those delivered by him to the defendant, a tax collector, and for which the collector stood charged in the Auditor's books, were offered in evidence to show that neither said Ranson nor his sureties could be liable to pay for said licenses. The court *a quo* properly refused to admit them for the purpose for which they were offered. Nothing prevented the defendant from returning the licenses at the time of his settlement with the Auditor and receiving credit for them.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

EVIDENCE—Continued.

7. Oral evidence was properly admitted to show the relationship of two witnesses and of plaintiff to her deceased uncle, whose will she wishes to be declared null and inoperative, and the disappearance of plaintiff's father and his age.

Under this proof the presumption arises that plaintiff's father is alive; and there being no proof of his death, the plaintiff can not represent him, nor accept and claim through him the succession of her deceased uncle. She is therefore without capacity or interest to attack the will of the deceased.

Mrs. P. Boe v. E. Filloul, Testamentary Executor, 126.

8. There is no law which requires authentic proof of the identity or existence of a plaintiff acting *sui juris*. Whether the plaintiff be a corporation or a private association of persons is of no consequence, so far as its right to enforce the collection of the note it holds is concerned.

First National Bank of Macon v. B. B. Simmes, 147.

9. Where the note is made payable to the order of the maker who indorsed it in blank, and the mortgage is in favor of any holder or holders thereof, and the note is identified and described in the act of mortgage, no other proof than possession is necessary. *Ibid.*
10. The plea that the defendant's title to the land purchased and for which the mortgage note was given is not perfect for the whole, can not be sustained. He does not allege that he has been disturbed in his possession; that he has been sued; or that he is threatened with a suit for the property. Besides, the parties interested in that question, who were called in warranty, are not before this court. *Ibid.*

11. Where there is no note of evidence on the subject in the record, the rule is that the judge who condemned the defendants as commercial partners solidarily on their note, did so on proper evidence.

A. Hefner v. S. Hesse and H. Verges, 148.

12. The objection that the partition among certain heirs is void, on the ground that it was not evidenced by a written act, is unsound, when they went into possession and were permitted to prove by parol the division or partition.

John W. Johnston v. Gustavus & Hypolite Labat, 159.

13. If it be granted that a partition is virtually a sale of each heir to the others, of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection. *Ibid.*

14. Where the objection was that the plaintiff alleged that the indebtedness of the defendant arose from family and plantation supplies

EVIDENCE—Continued.

furnished in 1870 and 1871, that the first item appearing on the plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first January 1870, was not, and did not purport to be for such supplies, and was too general and indefinite to admit of proof;

Held—That the objection was well taken and that the testimony offered should have been rejected.

The husband of defendant was the manager of the *Verona* plantation belonging to her, prior to her being separated from him by judicial decree in October 1869. During that year he received supplies from the plaintiff, and the sum of \$3970 charged, as before stated, as the first item on the account sued upon, is inferred to be, for the most part, for the supplies of 1869. It is in proof that for the period of 1870 and 1871, for which the supplies are charged, she had always refused to supply the laborers on her place, which was leased out to them, and had neither authorized her husband nor any other person to contract for supplies. The plaintiff can only have judgment for \$303 18, as the amount of articles established as furnished to defendant and which went to her individual use.

Joseph Moore v. Mrs. Inez Routh Gordon, 167.

15. On the amended rule taken on Mrs. Pipes, administratrix of the estate of her deceased husband and tutrix of her minor children, to show cause why a certain piece of property mortgaged to secure a promissory note indorsed by the deceased, should not be sold for payment of the same, after the plaintiff had introduced his evidence consisting of the note, the confirmation of Mrs. Pipes as natural tutrix, the account on which he figures as a creditor, its publication, and the judgment homologating the same, the defendant offered evidence to establish the allegations in her answer, to wit: That she had never filed any account, and that no one was authorized to file one for her. The plaintiff objected to the reception of this evidence, on the ground that it was attacking the judgment collaterally. The judge *a quo* maintained the exception. It was an error.

The defendant merely sought to show that the judgment upon which the plaintiff relied, was in reality no judgment against her. The plaintiff having rested his case upon the judgment, the defendant was authorized to show that the judgment had no foundation to stand upon. It is now a well recognized doctrine that one may use as a shield, what he can not use as a weapon.

Succession of James W. Pipes, 203.

16. Objection was made by defendants to the introduction of a diagram marked A, on the ground that, in an action of boundary, an

EVIDENCE—Continued.

official and authorized survey only can be made the basis of proceeding, and that the diagram being a private instrument or act of the plaintiff, is inadmissible. The court *a qua* admitted the diagram to be used by the witnesses on the stand to show the *locus in quo*, and the boundary in dispute. This ruling was correct under the pleadings. The plaintiff had the right to show the existence and locality of the alleged ancient line of division between the lands of the parties by parol evidence, and the diagram was admissible to enable the witnesses to render their testimony intelligible to the court and jury. *E. Boedicker v. John East et als.*, 209.

17. The objection to the admission of evidence showing that John East had pointed out to plaintiff in 1871, the line in question as the established boundary, was not well founded. John East is one of the defendants, and the husband of Frances East, the owner of the land, and seems to have acted for his wife. *Ibid.*
18. A bill of exceptions was taken to the admission of testimony introduced by the plaintiff to disprove a statement made by one of his own witnesses. The testimony was admissible. It was offered not to impeach, but to rebut. This court understands the rule to be, that although a party introducing a witness is not permitted to impugn his character for veracity, and to show that he is not worthy of belief, he may nevertheless introduce evidence to rebut a statement made by the witness as to a particular fact. *Ibid.*
19. Assuming that a husband acted as the agent of his wife in matters connected with the general administration of her affairs or business, it must be shown that he had authority, express and special, sufficient to bind her by his promise to pay the debt of a third person. *Baker & Thompson v. Mrs. A. L. Pagaud*, 220.
20. Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol. It must be in writing, the law is prohibitory, and this court can not recognize any other proof to establish the fact. *Ibid.*
21. The court *a qua* did not err in refusing the defendants to prove by parol that they were entitled to a credit of \$278, by reason of a voucher showing the fact. The voucher was the best evidence and should have been produced.

John Clements, President of the Police Jury of the Parish of Rapides, v. Eugene R. Biossat et als., 243.

22. The written acknowledgment of a debt need not be stamped before it can be received in evidence.

In this instance, the note described in the act acknowledging the indebtedness, and interrupting prescription as alleged, is not sufficiently identified as the one sued upon—which it was incumbent

EVIDENCE—Continued.

on the plaintiff to show. It was his duty to make out his case positively and he has not done so.

Charles E. Alter v. John McDougal et als., 245.

23. The copy of an act of sale of a lot and house under private signature, attested by two witnesses, one of whom made oath before the recorder of the parish of the execution thereof and of the signature of the parties to the act is sufficient to prove title to real estate, but the original must be produced and the signature proved, giving the privilege to the defendants of admitting or denying the genuineness of the signature. The evidence should have been rejected.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 248.

24. The question in this case is whether the sale, in consequence of which the note sued upon was given, is one *per aversionem*, or per acre.

On the trial, the court below did not err in receiving in evidence, offered by plaintiff, the deeds of sale from the Citizens' Bank and from the sheriff to him, in which the boundaries of the land sold were described.

It follows from said evidence that it was the sale of a plantation described in certain deeds wherein the boundaries were specifically set forth, with all that was upon it, for a certain price for the whole. It was a sale *per aversionem*, and not per acre. The plaintiff purchased by boundaries and sold by boundaries within which the number of acres is described "as more or less."

Edward J. Gay v. W. L. Larimore, 253.

25. In this suit against the succession of a defaulting tax collector and his sureties, a bill of exceptions is taken by defendants to the admission of a certified extract from the books of the State Auditor, showing the indebtedness of the deceased tax collector to the State, on the ground that it was not the best evidence, but a copy, and the absence of the original was not accounted for, and such original could not furnish proof of the statements contained in the copy.

The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office under his official seal.

State of Louisiana v. Succession of Masters et als., 268.

26. The defendant, having bound himself to give plaintiff within a

EVIDENCE—Continued.

certain time, a good and sufficient title to the sixteenth part of a lead mine, on the fulfillment of certain conditions by plaintiff, refused at the expiration of the delay to comply with his agreement. At the trial, the plaintiff offered in evidence the said agreement, which was rejected on the ground that it was not properly stamped, the court holding that the stamp necessary for the sale of real property should have been affixed instead of that for an agreement to sell. The court *a qua* erred. The document had on it the stamp required for such instruments.

Parol evidence to show that defendant had parted with his interest in said property, and that the stock company owning the same was insolvent, to the knowledge of the defendant, one of the stockholders thereof, was not improperly offered. Plaintiff was not seeking to establish his title to real estate, but to show defendant's inability to comply with the agreement to make a title. The evidence was not therefore subject to the rule requiring written proof of such title. It was certainly relevant so far as it tended to show plaintiff's compliance and defendant's non-compliance with their mutual obligations.

B. Burbank v. J. O. Pierce, 295.

27. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

28. Plaintiff was discharged because he closed the store in which he was employed at an unreasonable hour. This court is not satisfied that he was employed by the year. Besides, on his being paid for the time he worked at the rate of \$1500 per annum, he took the money without objection.

Victor Tanner v. S. Cambon, 353.

29. On the trial of this case the defendant offered in evidence a written instrument to show the contract entered into between the parties, and proposed to prove by witnesses then present that the plaintiff had failed on his part to comply with the written agreement. The judge *a quo* erred in refusing to admit this evidence. It was incumbent upon the defendant, under the allegations of his answer, to prove the alleged failure of consideration, and he was entitled to the benefit of any legal evidence in his power to establish said allegations.

Baker B. Pegram v. John B. Cooper, 361.

30. Where, in a contest for the ownership of lands, proof was admitted as secondary evidence, the destruction of the primary evidence

EVIDENCE—Continued.

being shown, and the court *a qua* held that the objections went rather to the effect than to the admissibility, the ruling was correct.

The evidence, however, fails to identify sufficiently the land in dispute as the land embraced in the destroyed deed, but in the capacity of one of the heirs of John Ruth, who, it is admitted, entered the land at the Land Office at Monroe, John K. Ruth, or his succession, represented by the plaintiff, can maintain this petitory action against the defendants who are possessors without title.

The constructions made by Penn, one of the defendants, being partly on plaintiff's land and partly on defendant's, plaintiff can not keep them by paying defendant the costs of construction, pursuant to article 508 of the Revised Code, because the building is not entirely on plaintiff's soil. The defendant is not entitled to a judgment in reconvention for the value of his constructions, but must be allowed to remove that part of them erected by him and resting on the soil of the plaintiff.

John Gordon, Administrator, v. Fahrenberg & Penn, 366.

31. The plaintiff moved for a new trial in the court below on the ground that, during the recess of court, the jury was illegally and improperly influenced by the defendant and his accomplices to render a verdict in favor of said defendant, notwithstanding the judge had warned the jury that they were to hold no conversation with any person upon the merits of the case before them. On the trial of this motion, plaintiff attempted to prove his allegations by witnesses, which he was not permitted to do. The judge *a quo* erred in refusing to hear the testimony offered.

Patrick Higgins v. O. C. Haley, 368.

32. Where, on the trial, plaintiff introduced in support of the averment of his petition, that his domicile is in the parish of Orleans, and therefore that defendant's reconventional demand, being disconnected with plaintiff's claim, could not be entertained, and the defendant offered a witness to contradict this evidence on the question of domicile, and the plaintiff excepted thereto:

Held—That the court *a qua* erred in sustaining the exception. The question of the domicile of the plaintiff was an important one, upon which depended to some extent, the fate of the plea in reconvention. If the plaintiff in fact had his domicile in the parish of Ascension, as alleged by defendant, the plea of reconvention could be heard. The defendant had an interest in contesting the point with plaintiff, and had the right to introduce evidence in support of his position, and to rebut the proof offered by plaintiff.

John H. Stephenson v. James P. Broadwell, 387.

EVIDENCE—Continued.

33. Admitting that a debtor should have intended to defraud his creditors by the sale of his property, yet it is essential that the purchaser should be a party to the fraud in order that the sale be set aside. The declaration of the notary that the cash payment had been made in his presence, which declaration is not contradicted by any positive testimony, would outweigh the assertions of witnesses as to the purchaser's want of funds. It is a difficult matter for one man to tell what amount of money is or is not in his neighbor's pocket.

Joseph Billgery v. Jacob Schnell and Martin Joachim, 467.

34. In this suit on an open account, the plea of prescription is set up by the defense. On its face the account is prescribed, but it is alleged that before prescription accrued it was acknowledged. The evidence of this interruption is the testimony of the plaintiff, in which he refers to a letter of the agent of one of the defendants, J. M. Peterson, now deceased. This evidence was inadmissible to prove an interruption of prescription against the succession of J. M. Peterson. Besides, as to the letter above referred to, it is rather a negation than an acknowledgment of indebtedness.

Thomas Fawcett v. W. D. Peterson et als., 514.

35. The plaintiff in this case claims title to a certain piece of property, and alleges that the defendant is about to take forcible possession of said property, wherefore he prays that she be enjoined from doing so. The defendant admits that the property described in the petition was conveyed to plaintiff by a notarial act, but specially avers that, although the said act ostensibly shows title in plaintiff to the whole of said property, yet that she is in truth the owner of one-half of it, forming a distinct tenement, and pleads her right to the possession of it.

The defendant introduced in evidence the written act of transfer from plaintiff to herself, in which plaintiff declares: "Said house stands in my name, but I have no interest in the same. It belongs to my sister, Mary Duncan." The execution of this act was proved before a notary public and duly registered.

The written act was clearly admissible, and certain letters and parol evidence were also properly admitted to show that the plaintiff, for a length of time, during the absence of defendant in Europe, recognized her right to the property she claims, by acting as her agent and collecting and remitting to her moneys collected from time to time for the rent of that property; and also to define the property and describe its locality.

The written instrument in the nature of a counter letter, not denied by the plaintiff, nor in any manner impugned by him, is an effectual bar against the plaintiff's pretensions to ownership of the property.

Michael Duncan v. Mary Duncan, 532.

EVIDENCE—Continued.

38. It is objected that parol evidence should not have been received to prove the actual boundaries of Hollywood plantation, because, in the old records of the parish, in which Hollywood is referred to, the lands constituting that place are described, and to receive parol evidence to vary or contradict these records is prohibited. This is an error. The boundaries or limits of Hollywood might be changed at will by its owner, if he also owned the adjoining tracts of land, and the evidence received was to show that the boundaries of Hollywood plantation, as well known in 1868, 1869, were different from what they had been eighteen or twenty years before.

The act of sale shows that the Hollywood plantation was sold as a separate and distinct thing, as a field inclosed, with known and well defined limits, and the evidence was to establish said limits. That is certain, which can be made certain.

It is also objected that a partition of real estate can not be established by parol, and therefore, that testimony to show that the field had been actually divided and taken into the possession of the heirs, should not have been received. No valid force can be given to this objection.

There is written proof, by authentic acts, that the partition had been made. The testimony was to prove the fact of the actual division of the field and of the possession by one of the parties of his third share under said partition. The evidence was properly received.

It was further objected that parol evidence should not have been received to prove an *error* in the description of the lands sold to Fleming & Baldwin. If that be true, it would be unfortunate indeed, for there could hardly be any other mode to prove a wrong description.

This is not an attempt to prove, by parol, a sale of immovable property, nor to contradict a valid existing instrument, but to show that, by accident or negligence, the instrument in question has not been made the actual depository of the intention of the contracting parties. *Ex necessitate rei*, parole vidence should be received.

It is on this ground that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindered to those of fraud, and should be governed by the same rules. It is not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to the contract.

The evidence shows that there was an error in the description of the property in the deed to Fleming & Baldwin to the extent that it conflicts with Hollywood plantation. The other plaintiffs are con-

EVIDENCE—Continued.

cluded by their own renunciation and ratification on record, and which they can not now oppose.

Fleming & Baldwin v. Scott and Ida Watson. Matilda J. Bowie et als. v. The same. (Consolidated), 545.

37. Where the settlement alleged by the plaintiff to have taken place in relation to partnership business, was shown by an instrument signed by the plaintiff and defendant and attested by one witness, and when, on the trial of the cause, the defendant offered to prove by the witness that this instrument was only a statement of the account of the partnership; and that, at the time of signing the same, the plaintiff was, otherwise and besides, largely indebted to him—which indebtedness was acknowledged by the plaintiff;

Held—That the objection to the introduction of such evidence was properly sustained. The written act bound the parties and must speak for itself. The purpose for which the testimony was sought to be introduced seems to be vague. If the object of the defendant was to show that the succession of which plaintiff is the administratrix, owed him more on account of the partnership than the stated account shows, it was clearly inadmissible; if to show that the administratrix individually owed him, it was irrelevant.

Mrs. O. Pickens, Administratrix v. Thomas Friend, 585.

38. The prescription of five years is pleaded against the plaintiff who sues the administrator of one of the solidary obligors on a promissory note. The plaintiff having offered to prove that the prescription had been interrupted as to the deceased, Steen, by the testimony of the other maker of the note, Hardy, establishing Hardy's acknowledgment of the obligation before prescription had accrued, and having also offered other witnesses to the same effect, this was objected to on the ground that parol testimony was inadmissible to prove any acknowledgment of promise to interrupt the prescription of a debt against a person deceased;

Held—That the overruling of the objection by the court *a qua* was correct.

The evidence offered was not to prove the promise or acknowledgment of the deceased debtor Steen, but to prove the acknowledgment of Hardy, the living debtor, nor was it to prove the creation of a new debt, after the old one had been extinguished by prescription. The acknowledgment of Hardy, a debtor *in solido* with Steen, interrupted the prescription as to him or his estate.

Eugene Petetin v. Vincent Boagni, Administrator, 607.

39. There was in this case no dispute about title to real estate. The only question was whether plaintiff could establish by witnesses that a house built on a certain piece of ground had been paid for by him. This court thinks he could.

J. M. Pool v. L. Fontelieu, Public Administrator, 613.

EVIDENCE—Continued.

40. The form of certificate to the return of a commission to take testimony is not sacramental, and it is sufficient if it appear in the return, when and where and by what authority the deposition of the particular witness was taken.

An affidavit that the district judge was absent from the parish is sufficient under the law to authorize the parish judge to grant the order of the district judge for taking testimony.

Lambert B. Cain, Liquidator v. Solomon Loeb, 616.

41. The verbal admissions of the accused ought always to be received with great caution. Besides, it is a rule of evidence that the whole admission is to be taken together. In this case the witness only heard part of it. The evidence should have been rejected.

The State of Louisiana v. Eli Gilcrease, 622.

42. Defendant having testified that he had received account sales for all the cotton which had been sent to him by plaintiff, and that he had delivered the same to his attorneys who were then in court, was asked to produce them. This was objected to by defendant. The objection was correctly sustained under article 140 of the Code of Practice. Besides there are account sales in the record regarding five hundred and twenty-nine bales of cotton, which is all the cotton received by the defendant from the plaintiff.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff, et al., 651.

43. The plaintiff's allegations charge the defendant with bad faith and fraud. Under the pleadings these were allegations which it devolved upon her to establish, and if she had not done so, perhaps the defendant might have contented himself with leaving the case where she did, but there is no reason why, if he chose, he should not be allowed to show by positive testimony that such grave charges against his honesty and honor were without foundation. The judge *a quo* did not err in permitting him to do so, and overruling plaintiff's objection to the introduction of such testimony. *Ibid.*

44. On the trial, plaintiff's counsel moved the court to continue the case to enable her to procure her testimony, or that they might be permitted to send for her, she being only a short distance from the courthouse. The judge properly refused and ordered them to proceed. Plaintiff had not been subpoenaed as a witness, and there was no process by which her attendance could have been compelled. If she had intended to be heard in her own behalf, she should have been present to testify when the time came. *Ibid.*

45. The testimony offered by plaintiff to show that other persons than Pargoud had furnished her with supplies and made improvements

EVIDENCE—Continued.

on her plantation, was properly rejected as irrelevant. It did not follow that the defendant had not done the same for her. *Ibid.*

46. The authorization to the President of the Claiborne Manufacturing Company to confess judgment was a matter of fact, and this fact it was competent for the defendant to establish by any sufficient evidence. The mere circumstance that the authority was not placed of record in the books of the company does not destroy the fact that it was given, and the party in whose favor the authority was to act could not be deprived of his rights, simply because the officers of the company were negligent in the performance of what was perhaps their duty.

Thomas B. Kilgore v. Thomas N. Willis et al., 665.

47. The fact of a husband being the bearer of an act which he presented as his wife's power of attorney to himself, and acting as her attorney in fact under it, might be shown, in order to establish his authorization to her, after it was distinctly proved that the wife signed the act.

Succession of Mary A. Gee. Opposition of heirs to the application of Public Administrator for administration, 666.

48. The judge *a quo* erred in not permitting it to be proved that an account which had been settled by a note was incorrect. Notwithstanding the note, the party interested had the right to show that the account upon which it rested was not right.

R. O. & M. Oglesby v. M. P. Renwick & Co., 668.

49. The judge *a quo* did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

E. D. Duckworth, individually and as administrator, v. Isaac B. Payne et al., 683.

50. Title does not come into view when the question is purely one involving the right of possession.

Chaffe, Shea & Loye v. George B. Abercrombie, 685.

51. The judge *a quo* erred when he permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

State of Louisiana v. S. W. Edgar, 726.

52. Authority to correct the errors of assessment complained of in this case is solely confided to the State Board of Assessors in the city of New Orleans and to the Auditor. It was therefore useless for the court *a qua* to hear testimony upon a point on which it was without authority to decide, to wit: the errors of the assessment, and the testimony offered was properly rejected. Besides, it was

EVIDENCE—Continued.

not alleged in the answer that the defendant sought to correct the errors complained of by making application to the State Board of Assessors according to law.

The constitutionality of that provision, making the decision of said board of assessors final as to "the valuations in the assessment roll," was not raised in this case. The constitutionality of a law will not be considered where an issue to that effect has not been raised. *State of Louisiana v. Widow J. C. de St. Romes*, 753.

SEE ADMINISTRATOR, No. 12—*Succession of E. Carlon*, 329.

SEE WITNESS, No. 1—*Mrs. LeBlanc v. Succession of Massieu*, 332.

SEE PARTITION, No. 2, 3, 4, 5, 6—*Gusman v. Hearsey*, 251.

SEE SEIZURES AND SALES, No. 9—*Johnson v. Dunbar*, 188.

SEE SUBROGATION, No. 2—*Durac v. Widow Ferrari et al.*, 114.

SEE GARNISHMENT, No. 2—*James Foulhouse v. Myra Clark Gaines*, 84.

SEE CRIMINAL LAW, 2, 3, 4, 5, 6, 7, 8—*State v. Didio Baptiste and Martini*, 134.

SEE CRIMINAL LAW, No. 16—*State v. Monie & Fontaine*, 513.

SEE CRIMINAL LAW, No. 13, 14—*State v. Shonhausen*, 421.

SEE CRIMINAL LAW, No. 15—*State v. Tenney*, 460.

SEE CONTRACT, No. 7—*Hern v. Gouldy, et als.*, 371.

SEE OBLIGATION, No. 1—*George M. Bailey v. David Denny*, 255.

SEE OBLIGATIONS, No. 6—*Louisa French v. Bach et al.*, 731.

SEE HUSBAND AND WIFE, No. 7—*Eliza Rainey v. Fanny Asher et al.*, 262.

SEE HUSBAND AND WIFE, No. 12—*Mrs. Feltus v. Blanchin & Geraud*, 401.

SEE LEASE, No. 10—*Grayson v. Buie*, 637.

SEE CORPORATIONS, No. 8—*Donnelly v. St. John's Protestant Episcopal Church*, 733.

EXECUTOR AND TUTOR.

SEE ADMINISTRATOR.

EVICITION.

SEE OBLIGATIONS AND LIABILITIES, No. 4—*Milton Wilson v. Benjamin et als.*, 587.

GARNISHMENT AND GARNISHEES.

1. A rule taken by plaintiff on the garnishee in this case to show cause why he should not pay a certain judgment against defendant, because he had in his possession, notwithstanding his negative answer which was alleged to be false, property, rights and money of defendant to pay said judgment, and the garnishee on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in

GARNISHMENT AND GARNISHEES—Continued.

vacation. The exception was overruled, and the garnishee filed an answer in which he prayed for a jury. The exception should have been maintained; the issues presented were such as should have been submitted, if desired, to a jury.

A. C. Denouvion v. Rebecca A. McNight—W. C. Harrison, Garnishee, 74.

2. The plaintiff, a judgment creditor of defendant, Mrs. Gaines, issued execution and instituted garnishment process against the city of New Orleans, the latter being a judgment debtor of Mrs. Gaines by virtue of a judgment and decree of the United States Circuit Court.

The plaintiff moved that the city of New Orleans and other garnishees show cause why the said city of New Orleans should not be condemned and ordered to pay to the sheriff the amount of plaintiff's judgment and *fiery facias*, on the ground that by their answers it was shown that the city had sufficient funds to pay.

On the trial, a bill of exceptions was taken by the plaintiff to the ruling of the court sustaining objections to the introduction in evidence by plaintiff of a certified copy of the *fiery facias* issued in the case of Mrs. Gaines v. The City of New Orleans in the United States Circuit Court, together with the returns on the *fiery facias* and to all evidence whatever in support of the averments made in the rule.

The objections were, that plaintiff could not proceed summarily by rule against said garnishees; that they were entitled to trial by jury; that the granting of the order asked for would interfere with the exclusive jurisdiction of the United States Circuit Court and bring the State court in conflict with it.

The court *a qua* erred. If entitled to a jury, the garnishee, city of New Orleans, went into the trial without praying for one. She was a mere stakeholder in this case without interest on her part as to whom payment should be made.

The evidence erroneously rejected was intended to show that the *fiery facias* held by the United States Marshal was returned into court unsatisfied in whole; that no property was found to seize, and that nothing was made on the writ. The Circuit Court of the United States had exercised its authority in the rendition of the judgment. The judgment was the property of Mrs. Gaines, and like any other property she owned, was liable to seizure by her judgment creditors. It is impossible therefore to perceive how a conflict of jurisdiction could arise from the proceedings on garnishment.

James Foulhouze v. Mira Clark Gaines, 84.

3. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

GARNISHMENT AND GARNISHEES—Continued.

In this case of *Halpin v. Barringer*, judgment was rendered for plaintiff, and a *fiery facias* having issued, Woelper was made garnishee. He answered that he had certain funds deposited in his hands, in a certain suit. Upon this answer judgment was rendered against him. This judgment is wrong.

The judgment in the case in which Woelper was made garnishee, was against Barringer individually, in so far as the record discloses. The money in the hands of the garnishee belonged to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him, and the payment of such a judgment would not release the garnishee.

Patrick Halpin v. John L. Barringer—W. Woelper, Garnishee, 170.

4. That the Crescent City Live Stock Landing and Slaughterhouse Company, garnishee, being an incorporated company, is subject only to the jurisdiction of the Superior District Court, and can not be brought into the Fifth District Court, may be true as regards original process, but it does not hold when the company is made garnishee. The court which rendered the judgment out of which the garnishment process springs, necessarily has jurisdiction over the party made garnishee.

The objection that Durbridge, the defendant, having sued the garnishee for the same subject matter in the Sixth District Court, no other court could obtain jurisdiction by service of citation or garnishment process, can not be maintained. The plaintiff is not bound by any proceedings to which he was not a party, and as he was not a party to the suit referred to, the decision in that case, whatever it may be, can not affect his rights.

Job Smith v. William Durbridge. Crescent City Live Stock Landing and Slaughterhouse Company, Garnishee, 531.

5. Cooper the garnishee in this case answered the interrogatories, acknowledging his indebtedness to Fuller, the defendant, and some time afterwards he filed another set of answers the effect of which is to release himself from any judgment in this suit. This can not be allowed. The object of such interrogatories is to elicit the truth, and ample opportunity is afforded to the person interrogated to answer clearly, fully and unequivocally. If he does not properly avail himself of such opportunity, it is his own fault.

A. B. & N. B. Thomas v. Henry Fuller. Jas. C. Cooper, Garnishee, 625.

SEE SUCCESSION, No. 1—*Mumford v. Mrs. Bowman & husband, 413.*

SEE SUCCESSION, No. 2—*Netter v. Herman and Levy, 458.*

SEE WILLS AND TESTAMENTS, No. 5—*Heirs of O. A. Johnson v. B. Johnson, 570.*

SEE JURISDICTION, No. 20—*Tessier v. Littell, 602.*

SEE ACTION, No. 11—*Daniel v. Ivy et als., 639.*

SEE SUBROGATION, No. 3, 4—*Dockham, Wife v. City of New Orleans, 302.*

SEE INSOLVENCY, No. 1—*Camutz v. Bank of Louisiana, 354.*

SEE INSURANCE, No. 8—*Malthus v. Crescent City Mutual Insurance Company, 386.*

HOMESTEAD.

1. Where the answer is that the mortgage was executed upon the land in favor of defendants before the plaintiff had acquired a homestead right upon it—that is, that Fuqua, while a resident of the parish of Terrebonne, and before he went to reside on the Oak Point plantation, in the parish of Madison, mortgaged that plantation to the defendants;

Held—That the law which conferred the homestead right existing at the time the mortgage was granted, the defendants accepted the mortgage subject to the contingency that might arise in the future, rendering it necessary for the mortgageor to avail himself of the benefit of the homestead law.

N. D. Fuqua v. John Chaffe & Bro., 148.

2. The plaintiff is not entitled to claim the homestead he pretends to be entitled to, out of the property seized, which is his undivided sixth interest in a tract of land containing some five hundred acres, which he held in common with other heirs. What is seized is not susceptible of being a homestead; it is only plaintiff's share in the land; it is an incorporeal thing; and what is incorporeal can not be the object of the operation of the homestead law.

Frank D. Henderson v. Joseph Hoy and Sheriff, 156.

3. A contest, to be paid by preference, out of the proceeds of this succession, arose in the court below, under the homestead law, between the vendor of a lot of furniture, the lessor of a house and lot furnished with said furniture, and the tutor of a minor child left in necessitous circumstances. In this court the contest is limited to the homestead claim, and the party asserting the vendor's privilege.

The claim of the minor must prevail. The homestead privilege was given the highest rank with one exception, that of the vendor, and for expenses in selling the property. As there are two privileges of the vendor, that on immovables, which enjoys the highest rank, and that on movables, which holds an inferior rank, the exception can not apply to both, but only to the one holding the first rank—that on immovables. Hence the homestead privilege must prevail over that of the vendor of movables, which itself is inferior to that of the lessor. This construction obviates all difficulty in construing the several articles of the Code bearing on the subject.

Succession of William Cooley—On Opposition to Tableau of Distribution, 166.

4. The judge *a quo* erred in allowing the widow, testamentary executrix in this succession, the homestead of \$1000 in addition to two sums: \$215, value of furniture, and \$140, rent, received by her. Whether the furniture belonged to the widow or not, its value,

HOMESTEAD—Continued.

according to the law, must be deducted from the homestead allowance. The rent also should have been deducted.

Succession of Tobias Drum—On Opposition of O. F. Berens, 539.

5. In the name of Joseph Mallon and his wife an injunction was taken to stop the sale of a plantation belonging to Joseph Mallon, on the grounds that they were entitled to a homestead. The wife made the affidavit and executed the bond, having been authorized to do so by the judge, on proof that the husband was absent.

The right to the benefit of the homestead act is not established by the facts of this case. But the husband, who alone could have asserted the right, if it existed, is not before the court, and nothing therefore can be decided to affect his rights. The wife has asserted no right personal to herself in this suit, and she has no right to represent her husband in the matter, nor can she bind him by her acts.

Joseph Mallon and Wife v. Frederick L. Gates, 610.

6. The plaintiff, in necessitous circumstances, can not be excluded from the benefit of the homestead law, when it is shown that the entire property of herself and the minor is less than \$1000.

It being proved that the minor owns \$216 95, and she, the widow, \$50, she is entitled to the usufruct of \$733 05 during her widowhood. Afterwards this sum is to vest in and belong to the minor heir of the deceased.

Whether or not the tutor of the minor has applied for the homestead is immaterial. The plaintiff, who has an interest, has made the application. The destination of the money, after the expiration of the usufruct, is fixed by law, regardless of the question whether the tutor of the minor has made a formal application for the homestead or not.

As the plaintiff is not the mother of the minor, she is not dispensed by article 560 of the Revised Code from giving security for the usufruct of the money. *Arsene Corner v. Cesaire Bourg, 615.*

7. The exemption of one hundred and sixty acres of land with the improvements, together with the work stock, supplies, etc., mentioned in the homestead act of 1852, shows that the intention of the law was to preserve a homestead for a farmer, in order that his family might be supported and his occupation might not be broken up. It has no application to a case like this, where there is merely a house and lot occupied as a residence by an attorney at law. *John L. Hargrove v. A. Flournoy, Sheriff et al., 645.*

HUSBAND AND WIFE.

1. Where the objection was that the plaintiff alleged that the indebtedness of the defendant arose from family and plantation supplies furnished in 1870 and 1871, that the first item appearing on the

HUSBAND AND WIFE—Continued.

plaintiff's account charged: "1870, April, account rendered \$3970," as may have accrued from and after first of January 1870, was not, and did not purport to be for such supplies, and was too general and indefinite to admit of proof;

Held—That the objection was well taken and that the testimony offered should have been rejected.

The husband of defendant was the manager of the *Verona* plantation belonging to her, prior to her being separated from him by judicial decree in October, 1869. During that year he received supplies from the plaintiff and the sum of \$3970 charged, as before stated, as the first item on the account sued upon, is inferred to be, for the most part, for the supplies of 1869. It is in proof that for the period of 1870 and 1871, for which the supplies are charged, she had always refused to supply the laborers on her place, which was leased out to them, and had neither authorized her husband nor any other person to contract for supplies. The plaintiff can only have judgment for \$303 18, as the amount of articles established as furnished to defendant and which went to her individual use.

Joseph Moore v. Mrs. Ines Routh Gordon, 167.

2. The creditor of a succession can call upon the courts of competent jurisdiction to see that the administration thereof be properly conducted.

This court sees no warrant in the law of Louisiana for answering in the affirmative the following questions: If a wife sue her husband for a separation from bed and board and a dissolution of the community which existed between them, and judgment is pronounced in her favor, dissolving the community; and if, after living apart for several years, and no judgment of divorce has been pronounced between them, they become reconciled, does reconciliation wipe out the judgment of separation and replace the parties in the same position they were in before it was rendered? Does property acquired by either of the spouses between the time the judgment was rendered and the reconciliation fall into the community?

There is no article in the Louisiana Code which corresponds with the article 1451 of the Code Napoleon. It was the law of France, even before the adoption of that code, that a community which had been dissolved might be re-established. Here there is no such law. The administratrix, in this case, has not filed an account of her administration within a twelvemonth. The law makes this her duty, for the non-performance of which, the penalty is dismissal from office.

Mrs. Anne Ford v. Mrs. Anne Kittredge, Administratrix, 190.

3. The debts of the community during its existence are the debts of

HUSBAND AND WIFE—Continued.

the husband. The property of the community is liable for the payment of them. Even more, the community property may be taken to pay debts of the husband contracted before the marriage. On the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community debts, is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal.

Hence the community property justly comes under his control until the debts are paid. Before their final settlement and discharge, the heirs have no absolute rights to the property of the community that can be legally recognized. Their interest in it continues contingent and uncertain until, by the result of the final discharge of all the obligations of the community, it is known whether or not there are assets remaining for partition between the survivor and the heirs of the deceased spouse.

O. K. Hawley, Public Administrator and his successor J. M. Wells v. Crescent City Bank, et als. 230.

4. If the surviving husband has the right to control the community assets, and to administer them after his wife's death, so as to make *bona fide* settlements of its debts, he has equally the right to waive or omit specific defenses to suits and indisputable claims. *Ibid.*
5. If, through fraud by a surviving husband in community to injure the heirs of the wife, he should sell or otherwise dispose of the community property, it would seem that they would have a remedy by the provisions of art. 2404 of the Civil Code. *Ibid.*
6. In this case the husband had by law the usufruct of the wife's half of the community property, consisting of the undivided half of the lands seized by the judgment creditors, no partition of the community property having been made. Nevertheless, without opposition on the part of the surviving husband, the public administrator came forth and administered on what he styled the estate of the deceased wife and enjoined the sale of the community property seized by judgment creditors of the community, and which is subjected to the payment of their judgment. This proceeding is irregular and illegal, and the injunction must be dissolved with damages. *Ibid.*
7. Plaintiff borrowed money to pay two notes which were secured by mortgaged upon the property she claims as her own, and to prevent the sale of which she enjoins the sheriff, and the two notes were paid with the proceeds of this loan. It is not, therefore, true, as she alleges, that the money was borrowed and used for the benefit of her husband. This is established by the testimony of

HUSBAND AND WIFE—Continued.

the notary who drew the act of mortgage and of the broker through whom the money was borrowed. It was a fact necessary to be established. The objection to this evidence was properly overruled.

The acts of mortgage under which plaintiff borrowed the money upon the note, the collection of which she has enjoined, and which show her antecedent indebtedness, relate that she had been specially authorized to borrow the money by the judge of the Third District Court of the parish of Orleans. Her objection to the introduction of these acts was not well founded. They were signed by her and were, therefore, her own acts and declarations. Admitting that they could be disproved by parol, the burden of doing so rested upon her.

Mrs. Ann Eliza Rainey, wife of James H. Massey v. Fanny Asher and Sheriff Harper, 262.

8. The objection that the judge of the Third District Court of the parish of Orleans, where she resides, had no power to authorize her to make the loan, is without solid foundation.

The judge of the Third District Court is as much a district judge as any other district judge in the parish. The law says that a married woman who desires to borrow money and to mortgage her own property to secure the same, must be authorized so to do by the judge of the district or parish in which she resides. As the judge of the Third District Court, although having a limited jurisdiction for the convenience of business, is a district judge for the parish of Orleans, it follows that plaintiff was authorized by the judge of her district in the sense of the law. *Ibid.*

9. It can not be contested that a married woman has a right to compromise a law suit pending against herself; and transactions have, between the interested parties, a force equal to the authority of the things adjudged.

It is difficult to imagine, in this instance, how it can be pretended that the money loaned by Sollibellos, the defendant in injunction, for enabling Mrs. Barron to effect a compromise about a suit brought against her, did not inure to her benefit, nor can she be listened to when saying that the debt on which she has been sued, was the debt of her husband, when the contrary is proved by the compromise thus agreed to with a view of putting an end to that law suit.

The interventions were improperly allowed in an injunction suit which was to prevent a sale. If the intervenors have privileges, they can only enforce them upon the proceeds of the sale of the property in the hands of the sheriff; and if any part of the prop-

HUSBAND AND WIFE—Continued.

erty seized is claimed to belong to some one else than the debtor who enjoined, that claimant's remedy is by injunction obtained according to law. *Maria L. Barron v. J. F. Sollibelloe*, 289.

10. The wife can, with the consent of her husband, sell her separate property and give the proceeds to her husband, who then becomes her debtor. Having the authority to sell and having made a sale in due form, the object for which it was made by the wife, to raise money for her husband, does not make it any the less a sale as to third persons without knowledge. The public knows that a wife has the right to sell her property if duly authorized, and that her husband may receive and use the proceeds, and if there is nothing to create suspicion, or put the capitalist on his guard, he may safely discount a mortgage note given by a purchaser to a married woman as a part of the price of her property regularly sold by her. *Mrs. M. H. Walker, Wife, etc. v. F. Limongy et al.*, 324.

11. Art. 2446 of the Revised Civil Code provides that a contract of sale between husband and wife can take place only in the three cases which it mentions.

In this instance, the husband and wife had no right to contract in the manner attempted, and the mortgage sought to be enforced by executory process is utterly void.

The defendant erroneously contends that, as a third holder before the mortgage paper, resulting from this illegal contract, became due, he is not affected by said nullity.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper governed by the rule invoked by defendant.

F. S. Garner, Administrator v. Watson M. Gay and Sheriff, 375.

12. The mortgage note, which is the object of this suit, was granted by plaintiff in injunction under the authorization of the judge, pursuant to the act of 1855. She therefore occupies no better position than a *femme sole*. If there was a want of consideration, it devolved on her to prove it.

The plaintiff excepted to the ruling of the court refusing to allow her to prove that her plantation was cultivated by her husband and his brothers during the years 1868 and 1869, and therefore the supplies furnished by the defendants did not inure to her benefit.

The court *a qua* did not err in refusing the evidence, because it would have contradicted her judicial admissions in the petition for injunction. *Mrs. Mary E. Feltus v. Blanchin & Giraud*, 401.

HUSBAND AND WIFE—Continued.

13. Plaintiff applied for authority to borrow money to a judge of competent jurisdiction, and was by him authorized to borrow it. The act of mortgage was not consummated until her authority to borrow had been obtained. If any force, threats, or improper influences were brought to bear upon her by her husband, it does not appear that the defendant, who loaned the money upon the faith of the authorization of the judge and the security of the mortgage was, in any manner, a party to it. The plaintiff's injunction to prevent the sale of her property must be dissolved.

Mrs. Louisa Reich, wife of Rhodor v. Hyacinthe Rosselin et als., 418.

14. It appears from the record that the property claimed by plaintiff was seized and sold at the suit of Marie Jeanne Piseros and bought by Chevalley, one of the defendants. It was originally purchased in the name of plaintiff, but this was done during her marriage, as her husband appears as a party to the act authorizing the purchase. The property so purchased must, in the absence of anything being shown to the contrary, be considered community property, and liable for the community debts.

It is moreover shown that the wife was a party to an act of mortgage by her husband of this same property in favor of Marie Jeanne Piseros, to secure the payment of the purchase price of the same, and fully renounced her rights on the property.

Caroline Richardson, wife of A. Piseros v. E. R. Chevalley et als., 551.

15. It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

Succession of Alexander McDonald, 590.

16. The law expressly allowed defendant, J. A. Chalaron, to make a giving in payment to his wife, and it was his duty to cause the registry of her mortgage to be made. This settlement with his wife can be corrected by his creditors, if found to be erroneous and to their prejudice. If the defendant believed the suits in which he confessed judgment were just demands against him, it was not only his privilege, but his duty to admit their correctness or confess judgment. This is no ground for attachment.

J. W. Wilson, Administrator v. J. A. Chalaron et al., 641.

17. The plaintiff in injunction, Mrs. Murphy, sets up, among other grounds, that she has an interest and ownership in the lots ordered to be seized and sold, superior to the mortgage of Hoss, the plaintiff in execution—which mortgage was granted to Hoss by her husband, now deceased, to guarantee the payment of two

HUSBAND AND WIFE—Continued.

promissory notes, and which she alleges to be a fraud upon her rights and void. She further alleges that she has a claim against the succession of her husband for rents and revenues which were under his control and administration, and which were received and converted by him to his own use; that being a party in interest, she was entitled to notice in the executory proceeding, which was not given to her, but only to McWilliams, the executor of her husband. She further avers nullity of the proceeding on the ground of want of jurisdiction in the district court that rendered the order of seizure—the succession being now under administration in the parish court, and was so at the time the order of seizure was granted;

Held—That the grounds urged by the plaintiff in injunction do not authorize the injunction. The district court had jurisdiction to issue the executory process, and the rights asserted by the wife are not such as to justify the injunction of the sale of the husband's property, or property of the community. If she has real rights upon such property, they can be enforced upon the proceeds. If her rights are merely usufructuary, they will not be affected by the sale enjoined, as it is only the naked ownership of the property that is sought to be sold.

Jacob Hoss v. J. G. McWilliams, Executor, 643.

18. The fact of a husband being the bearer of an act which he presented as his wife's power of attorney to himself, and acting as her attorney in fact under it, might be shown, in order to establish his authorization to her, after it was distinctly proved that the wife signed the act.

Succession of Mary A. Gee, 666.

19. The defendant, a married woman, is sued on three mortgage promissory notes drawn by her. It being in evidence that the defendant executed said mortgage on her separate property in favor of a firm of which her husband was a partner, to secure the payment of a certain sum of money which had always appeared in the books of the firm as the debt of her husband, who, to the knowledge of the firm and without their objection, was in the habit of drawing largely in excess of the amount he was authorized by the articles of partnership to withdraw annually, and which sum invested by her in the mortgaged property, sought to be seized, was given to her at a time when he was indebted to her in a greater amount for the restitution of paraphernal funds;

Held—That said mortgaged property can not be seized by the hold-

HUSBAND AND WIFE—Continued.

ers of the notes, on the ground that she can not bind herself for her husband's debts.

Ferdinand Koechlin v. Mrs. Louisa Thontke, wife of F. J. Lorber, 737.

SEE DONATIONS, No. 1, 2, 3—*Succession of Thomas Hale, 195.*

SEE EVIDENCE, No. 19—*Baker & Thompson v. Mrs. Pagaud, 220.*

SEE INSURANCE No. 5, 6, 7—*Succession of A. Constant Hearing, 326.*

SEE COMPROMISE, No. 2—*Archinard, Widow v. Louis Boyce, 292.*

SEE MORTGAGE, No. 6—*Succession of Oordeviolle v. Dawson, 534.*

SEE AGENT AND PRINCIPAL, No. 3—*Peter James v. Mrs. Lewis and Husband, 664.*

SEE INJUNCTION, No. 19—*Julia Lewis v. Winston et als., 707.*

SEE BILLS AND PROMISSORY NOTES, No. 21—*Brooks v. Mrs Stewart and husband, 714.*

ILLEGITIMATE CHILDREN.

SEE ADMINISTRATOR, No. 11—*Drouet v. Drouet, 323.*

INJUNCTION.

1. The material facts in this case are as follows: The plaintiffs were, in 1871 and 1872, the commission merchants and factors of Wilkinson, who owed them in April, 1872, about \$18,000, evidenced by two notes secured by mortgage, at which date their payment was extended to first of February, 1873. A pledge of other notes and another mortgage were given to secure the said indebtedness and the advances to be made for the crop of 1873, to the amount of \$12,000, the planter obligating himself to ship the crop of that year and each subsequent year, if necessary, to pay the said sums with interest, and all commissions, expenses, etc. In December, 1872, the shipment in question was made of hogsheads of sugar and barrels of molasses, marked with the initials of plaintiffs, but without any special instructions from Wilkinson. The plaintiffs received the bill of lading early on the morning of the day of its arrival. A few hours afterwards, on the same day, the sheriff of the parish of Orleans, with a *fi. fa.* from the parish of Plaquemines, in the suit of D. & J. D. Edwards v. Wilkinson, went aboard of the steamboat and seized the said sugar and molasses as the property of the said Wilkinson. Whereupon the plaintiffs, claiming the custody and control of the said property to the exclusion of Wilkinson's creditors, and as exempt from seizure by them, took an injunction.

The court thinks that the property belonged to Wilkinson, the shipper, and that his creditors might seize, subject to the rights of the consignees to be settled contradictorily with the seizing creditors,

INJUNCTION—Continued.

inasmuch as the consignees were the agents of the shipper, and their constructive possession under the bill of lading did not give them an ownership, nor exempt the property from the pursuit of the creditors of the owner, either by actual seizure under the *fi. fa.*, or by the garnishment process. The latter mode is not exclusive. Either may be resorted to according to circumstances.

The injunction was not the remedy to which the plaintiffs were entitled. The sheriff should have proceeded with the sale, leaving the plaintiffs and defendants to settle their respective rights to the proceeds.

Chaffraix & Agar v. W. P. Harper, Sheriff, and D. & J. D. Edwards, 22.

2. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does not come under the exceptions contained in the 494th article of the Code of Practice.

James McCracken, Administrator v. James Madison Wells, 31.

3. This is an injunction suit, in which the plaintiff alleges that the judgment under which execution issued is a nullity, on the ground that there is no legal corporation plaintiff therein, or owner thereof, such as the Accommodation Bank.

There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in the original suit. Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence it is *res judicata*.

Francis O. Mahan v. Accommodation Bank et als., 34.

4. Where the ground for the injunction restraining the executory proceedings of the defendant was, that there is a deficiency in the measure of the property bought by the plaintiff from the defendant—the price of which is secured by the mortgage sought to be enforced—and that, on account of this deficiency, there should be a diminution of the price;

Held—That the sale being *per aversionem*—reference to the plan and to the streets bounding the squares controlling the expressions in regard to the measurement of the ground—the alleged deficiency can not avail the plaintiff in injunction.

Albert R. Whitney, George W. Whitney, Administrator v. Bertrand Saloy, 40.

5. The plaintiff in injunction not having set up, in defense to the suit against him, as he might have done, that he was discharged in bankruptcy from all his debts, can not make it a cause for an injunction.

P. Gallaher v. J. T. Michel et als., 41.

INJUNCTION—Continued.

6. When an injunction was dissolved upon the face of the papers, no statement of facts, evidence or assignment of error is necessary to enable this court to pass on the correctness of the said ruling. This court has only to look into the allegations or grounds for the injunction to determine whether or not they are sufficient to authorize the writ; but this can not be done on a motion to dismiss.

A. W. Walker v. E. Villavaso, 42.

7. Where, after a first injunction, which was dissolved, the sheriff was simply proceeding with a sale long after the seizure had been made, and where, on a second injunction being taken, it was alleged as a ground for said injunction that no demand of payment and no notice of seizure were ever served according to law;

Held—That these objections, if there be cause for them, should have been made on the first injunction. *Ibid.*

8. Article 666 C. P. and the two preceding articles must all be construed together, so as to give effect to each.

Where the ground for injunction was that the advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure;

Held—That when a plantation and its fixtures are to be sold under a mortgage, as in this case, the sale must be made at the seat of justice unless the debtor require it to be made on the plantation.

The advertisement in this case describes the articles, called movables by plaintiff, as constituting a part of the buildings and improvements on the plantation, and with one or two trifling exceptions, they are what the law subjects to the mortgage existing on the plantation; but, if they were movables, it would not be a ground for injoining the sale of the property subject to the mortgage, and besides, the plaintiff has not requested the sale to be made on the plantation. *Ibid.*

9. An error in the calculation of interest on the judgment rendered and sought to be executed, is no ground for an injunction. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *fiery facias* be issued for too large a sum. *Ibid.*
10. If the description of property to be sold is insufficient, the owner thereof can not be injured, because there will be no sale. Therefore this is no ground for an injunction by the defendant in execution. *Frank D. Henderson v. Joseph Hoy and Sheriff, 156.*
11. The plaintiff, a mere mortgagee, had no right to enjoin the sale of the plantation of Bovard under executions in favor of a number

INJUNCTION—Continued.

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INJUNCTION—Continued.

of creditors of said Bovard, on the grounds substantially that the sheriff was proceeding irregularly and illegally in making said sale. If the sale be null for illegality, it can not affect his rights; and if the sale be valid, his remedy would be by third opposition to claim the proceeds of the sale.

William G. James v. John E. Breaux, Sheriff, et als., 245.

12. The plaintiff attempts to restrain by injunction the defendants, his daughters who are his judgment creditors, from selling under execution his dwelling house and other buildings which he erected on their lot, separately from the lot.

As the plaintiff could transfer whatever right or ownership he may have to the buildings standing on the defendants' property, it is not seen why a forced sale thereof may not be made by the defendants, his judgment creditors.

Leonville Augustin v. Mrs. H. Dours et als, 261.

13. The order of the court *a qua* dissolving the injunction in this case is one which, in the opinion of this court, might work an irreparable injury to the relator; therefore the relator had a right to appeal from it. The judge below erred in dissolving the injunction.

State of Louisiana ex rel. John T. Hayes v. The City of New Orleans, 304.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thomas J. Emerson and George F. Porter, 351.

16. A party can not be enjoined from prosecuting suits for claims, whether well founded or not. On the defense the parties can be heard and their rights adjusted. The intimation that a party fears he may not obtain justice before a particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction.

INJUNCTION—Continued.

The judge *a quo* dismissed the rule, and on the trial of the merits dissolved the injunction, with \$100 for counsel fees. As no evidence was admitted on the trial of the motion, in reference to any damages, and the motion should have been sustained, no damages can be allowed. This is not the class of cases in which damages may be given without special proof. The plaintiffs and their securities are liable on their injunction bond.

Butchers' Benevolent Association v. R. King Cutler, 500.

17. On the trial of a rule, contradictorily with the parties in interest, to show cause why a writ of injunction should not be granted to restrain a sale as prayed for by relator, the judge *a quo* rendered an interlocutory order refusing the injunction and declined to grant an appeal from said order. In this the judge erred.

The order complained of was certainly an interlocutory order working the relator an irreparable injury. His property was about to be sold for the debt of another; he was entitled to an injunction to protect his right of property, having made affidavit and tendered bond according to law. These sworn averments must be taken as true for the purposes of this inquiry. The relator has the right to have the judgment revised. Upon examining the evidence this court may find that the judge erred, and that an injunction should issue.

The right of appeal is a constitutional right, and it should be jealously guarded by this court.

State ex rel. Van Norden v. The Judge of the Superior District Court, 550.

18. The judge *a quo* did not err in refusing to allow the plaintiff to take a judgment by default on the supplemental petition which had been filed by her, in which she set forth additional reasons why an injunction should issue. The allegations were not sworn to. Admitting that a supplemental petition to an application for an injunction is permissible, which it is not necessary to determine in this instance, still the truth of the allegations in the supplemental petition should be sworn to.

Before proceeding to trial, plaintiff moved that the rule taken upon her by Pargoud, to prove the truth of her allegations in a summary manner, should be considered as an answer. The judge did not err in refusing the motion. Defendant had the right to call upon the plaintiff to verify the truth of her allegations without an answer.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff, et al., 651.

19. Where the wife alleged that she was separated in property from her husband, that the property seized and of which she was in pos-

INJUNCTION—Continued.

session at the time belonged to her, and prayed for an injunction to prevent the sale of said property to pay her husband's debts, the exception that plaintiff had failed to set forth the nature of her title can not be sustained. This is not a petitory action, although the title to property be incidentally involved.

The affidavit of the plaintiff in injunction, that the facts and allegations set forth are true, is sufficient. It was not necessary to state that they were all true. The importance of the omission of the word *all* in the affidavit can not be seen.

The objection that the husband has not authorized his wife to bring this suit was properly overruled. It is alleged in the petition that she is authorized by her husband, and this is not specially denied. But the injunction bond is signed by the husband. That is sufficient proof that he has authorized the institution of this suit.

Julia A. Lewis v. Winston, Morrison & Co. et als. 707.

20. The objection that there was not sufficient evidence to authorize the order of executory process can not be examined on an injunction. The remedy was by appeal.

The City of Shreveport v. A. Flournoy, Sheriff, et al., 709.

SEE MANDAMUS, No. 1—*Citizens' Bank of Louisiana v. A. Dubuclet*, 91.

SEE SEIZURES AND SALES, No. 6, 7—*Chaffraix & Agar v. Packard et als.*, 172.

SEE BONDS, No. 14—*Levin et als. v. Lacey*, 270.

SEE OFFICES AND OFFICERS, No. 6—*Cramer v. Brown*, 272.

SEE BONDS, No. 16—*Pottier v. Grant et al.*, 283.

SEE BONDS, No. 19—*State v. Clinton and Dubuclet*, 346.

SEE NEW ORLEANS, No. 3—*Kendig & Co. v. City of New Orleans*, 357.

SEE DAMAGES, No. 4—*Cohen & Wilson v. Avery et als.*, 359.

SEE PARTITION, No. 8—*Lyons v. Dobbins*, 580.

SEE APPEAL, No. 26—*Simon v. Walker*, 603.

SEE SEIZURES AND SALES, No. 18—*Richardson v. Dinkgrave*, 632.

SEE HUSBAND AND WIFE, No. 17—*Hoss v. McWilliams*, 643.

INSOLVENCY OR BANKRUPTCY.

1. The plaintiff having obtained judgment against the Bank of Louisiana, took garnishment process against Generes and sought to make him liable. Generes excepts on several grounds, and among others that the plaintiff made proof before a register of the United States District Court of the judgment obtained by him against the said bank which had been declared bankrupt, and filed his proof with the assignees on July 3, 1871, thereby making himself a party to the bankrupt proceedings and abandoning all other rights, liens

INSOLVENCY OR BANKRUPTCY.

and privileges against the bankrupt, except those reserved by said proof; that by the order of the United States District Court, rendered July 1, 1869, all persons were enjoined and restrained from interfering with the assets or property of the bank. The exceptions were correctly sustained by the court *a qua*.

C. Camutz, Syndic, v. The Bank of Louisiana, L. F. Generes, Garnishee. 351.

SEE ESTOPPEL, No. 4—*Widow and heirs of Jean Pardo v. A. Pardo*, 364.

SEE TRANSFER OF PROPERTY, No. 1—*DeGreck & Co. v. Murphy et als.*, 296.

INSURANCE.

1. Where the contract of insurance contained the following clause :
“ This policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer by sale or otherwise without such consent, this policy shall from thenceforth be void and of no effect;”

Held—That this prohibition does not apply to the assignment of the interests of one partner to the other, and that it can not be inferred to have been the intention of the contracting parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants, on pain of forfeiting the policy.

The prohibitory clause must be construed strictly, and if its application to the case before this court be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance.

It is true the clause expressly prohibits the transfer by sale or otherwise of the policy; but it does not expressly prohibit a change of interests among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other.

If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument and not left to inference, because a prohibitory clause can not be extended by implication.

Antonio Dermani v. Home Mutual Insurance Company of New Orleans, 69.

2. In a contract of insurance, as in every other, it is the intention of the parties that must be considered. In the instrument before the court there is nothing to be found to warrant the conclusion that the plaintiff forfeited the policy by accepting the assignment of his partner's interest in the business, without the written consent of the defendants.

INSURANCE—Continued.

In the course of business partners often become dissatisfied, and change the firm by one party transferring his interest to the other, as was done in this case. This occurrence is so common, that these parties must be presumed to have contracted, knowing it might arise during the period of the insurance, and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument.

By the assignment in question no new party was introduced into the contract whom the defendants might not be willing to trust. In issuing the policy to Joseph H. Taboury & Co., they virtually declared the trustworthiness of each of the partners, so that it can not be objected that, by virtue of the assignment to plaintiff, the defendants were forced to insure a person they had not consented to trust. *Ibid.*

3. Where the life policy of insurance contained the following clause: "This policy shall not be binding on the company, until countersigned by J. R. Purvis, agent, of New Orleans, Louisiana, and the advance premium paid," and where before the policy was received by the agent at New Orleans, John W. Hardie, the person intended to be insured, died;

Held—That the premium never having been paid, and the policy never countersigned by J. R. Purvis, the agent, or delivered to the assured or his representative, the plaintiff can not recover.

The obligation contracted by the company was a suspensive conditional obligation, depending upon future and uncertain events which have not happened.

Mrs. Lydia A. Hardie v. St. Louis Mutual Life Insurance Company; 242.

4. The plaintiff sues defendant for the alleged loss of a stock of goods by fire. The only important question in the case is, whether the action is barred, because it was not brought within one year from the date of the loss. The fifteenth condition of the policy provides: "All claims under this policy are barred unless prosecuted within one year from the date of the loss. No claim for loss to bear interest before judicial demand."

The court finds nothing doubtful or ambiguous in this clause of the policy. It means what it says: "That all claims under the policy are barred unless prosecuted (that is sued on) within one year from the date of the loss."

Adam H. Carraway v. The Merchants' Mutual Insurance Company, 298.

5. A man may take out a policy of insurance on his life in the name

INSURANCE—Continued.

of any one, or having taken it out in his own name, he may, with the consent of the assurers, transfer it to whom he pleases.

Succession of A. Constant Hearing, 326.

6. A policy of insurance is not a piece of property ; it is the evidence of a contract, the contract being that a certain sum of money will be paid upon the happening of a certain event, to a particular person, who is named in the policy, or who may be the legal holder thereof. *Ibid.*

7. A creditor may have the life of his debtor insured, even without the consent of his debtor. A husband has the right to insure his life in the interest of his wife and child, as well as in the interest of his creditor. If the policy issues to the wife, or is properly transferred to her, the amount stipulated therein belongs to her when the event secured against happens, and she can not be forced to inventory it as a part of her husband's estate. The object he had in view would be defeated if a contrary doctrine prevailed.

It is the wife whom the husband seeks to protect when he insures his life in her behalf. Otherwise he would not insure in her name. He has no need to protect his creditors by such a mode, for they can protect themselves. *Ibid.*

8. Plaintiff alleges that he is the owner of a certain insurance scrip of the Crescent Mutual Insurance Company and of certain dividends accrued thereon, which the defendants refuse to deliver to him. Defendants admit that they held such scrip and dividends, but aver that the same were garnished in their hands by one Hillman, a judgment creditor of plaintiff; that; subsequently, judgment was rendered in favor of Hillman against defendants, as garnishees, who have paid said scrip and dividends to said Hillman; and they therefore deny any liability to plaintiff.

There are two insurmountable difficulties in the way of the defense set up by respondents:

First—Plaintiff's assets or property in their hands was not seized by the garnishment process, because the *fieri facias* was not in the sheriff's hands when the interrogatories were answered; and the judgment against them in that proceeding was a consent judgment not binding on the plaintiff, nor in any manner divesting his title to the property in question.

Second—The judgment upon which the pretended garnishment process issued, was an absolute nullity, because there was no citation served on Matthews against whom it was rendered; and a seizure or sale under a judgment, void from want of a citation, neither confers a right nor divests a title.

Edward Matthews v. Crescent City Mutual Insurance Company, 386.

INSURANCE—Continued.

9. Hawes & Bowen of the city of New Orleans, transferred to W. S. Pike, as assignee of their creditors the steamer "Wm. Tabor," of which they were sole owners. Pike effected an insurance on said steamer in the office of the defendant. A short time after, the master and mariners of the vessel committed barratry by causing her to be fraudulently stranded on the rocks near Key West. The vessel and cargo were brought to Key West, where a large portion of the cotton on board was condemned for salvage. The vessel then proceeded to New York, where, on her arrival, she was immediately libelled by the owners of the cotton for its non-delivery in consequence of the barratry of the master and mariners. She was sold to satisfy the decree for damages, and the proceeds were insufficient to cover them.

The instrument referred to purports to be a transfer or sale of the vessel, but the constituent elements of a contract, and not what the parties call it, must be considered in order to determine its character.

An examination of that instrument shows that it was neither a sale nor *a contract of giving in payment*, but an innominate contract imposing certain limitations upon the ownership of Hawes & Bowen, and conferring certain rights as to the vessel upon the assignee in behalf of their creditors. It has the features of the contract of pledge and of the contract of mandate. It was not a sale which divested Hawes & Bowen of their ownership. Therefore, as the creditors were not the owners of the vessel, as they undoubtedly had an insurable interest in her, and as the policy was knowingly issued for their benefit, it follows that they can recover from the defendant through the plaintiff who is their representative, the loss resulting from the barratry of the master.

The plea of the defense that the loss occurred by stranding, and that stranding is not covered by the policy unless produced by stress of weather, or some other unavoidable cause, can not be maintained. It was the barratrous conduct of the master which caused the stranding and the loss; barratry being insured against, and the vessel being a total loss to the creditors, the plaintiff is entitled to recover.

William S. Pike v. Merchants' Mutual Insurance Company, 392.

10. The insurance company, defendant in this case, refuses to pay, on the ground that the policy excepted liability, "if the insured should die by his own hands," and it alleges that he committed suicide.

It is evident that these words can not be interpreted in their literal sense, for they would exempt the company from liability if the in-

INSURANCE—Continued.

sured came to his death by the accidental discharge of a gun or pistol in the hands of the insured, or if he took poison through a mistake, while they would not exempt the company from liability if the insured were to commit suicide by jumping into a precipice or a river. Therefore the intention of the parties must be sought in order to explain the latent ambiguity of the words, and the court thinks that the common intent was to exempt the company from liability from the *voluntary destruction* of the insured by whatever means accomplished.

It is not believed that, by the expression above mentioned, the parties intended to exempt the risk that the insured might become insane, and might, when in that state, commit suicide.

The test of responsibility in civil as well as in criminal cases, is the state of the actor's reason or mental faculties. Therefore, if the deceased were insane when he committed the act of self-destruction, no responsibility attaches to his act.

The onus of proof is on the party who affirms the fact that the insured died by his own hand, and this has not been legally proved in this case.

It is true that the witnesses who testify as to his death express it as their *opinion* that he killed himself or committed suicide, but their opinions can not be regarded as evidence of the fact; nor do the facts and circumstances proved point to the voluntary self-destruction of the insured, to the exclusion of all other reasonable hypothesis. But if that fact were established, the plaintiff has proved that the deceased was insane at the time and before his death.

Mrs. Regina Phillips v. The Louisiana Equitable Life Insurance Company, 404.

11. The following note was given to defendants for a part of the premium due on renewal for a policy of insurance: "New York, May 7, 1870. Three months after date, *without grace*, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and twenty-nine dollars and interest, value received in premium on policy No. 2051 (37,593), which policy is to be void in case this note is not paid *at maturity according to contract in said policy*."

The question is whether this note was payable at noon, on the eighth of August, 1870, (the seventh being Sunday), or during business hours.

The portions of the policy relied on by the defendants as fixing the maturity of said note are the following: "And the omission to pay the said annual premium on or before twelve o'clock noon, on the

INSURANCE—Continued.

day or days above mentioned for the payment thereof, or failure to pay at maturity any note (other than the annual premium note) given for premium interest or other obligation on this policy, shall then and thereafter cause said policy to be void, without notice to any party or parties interested herein."

The insured paid a portion of the premiums in cash and for the balance gave three notes, one of which is above transcribed. The receipt of the company runs thus: "Renewal No. 69,003. New York, May 7, 1870, received of Azema Leigh seven hundred and ninety-eight dollars and eighty cents in cash, and notes (exclusive of interest as stated in the margin hereof), which amount, *if said notes are duly paid on or before the maturity thereof*, will complete the payment of the premium necessary to continue policy No. 2051 in force until the seventh of May, 1871, at noon, and in case said notes, or either of them, shall not be paid *on or before* the maturity thereof, said policy shall at once become void without notice," etc.

In the opinion of the court the notes referred to in the policy as being payable at noon, are the annual premium notes, which are due on seventh of May of each year, and not the notes given for a part of the premium and falling due at such dates as may be agreed upon at the time. Whenever the words "at noon" are used in the policy, it is in immediate connection with the words "seventh of May." The note itself and the receipt contain the stipulation in general terms, that, "if not paid at maturity," the policy will be void. The expression or words at the end of the note, "*according to contract in said policy*," must be construed as referring to the effect of non-payment at maturity—the contract in that respect—rather than the *hour* at which the note must be paid.

The words "at maturity" refer to and include the whole day unless specially and distinctly limited to a certain hour of the day. The expression, "three months after date without grace," means that the note is to be paid on the last day of the three months, without the usual three days of grace. No reference is made to *hours*. The *annual* payments were to be made by *noon* of the day, because probably the policy was fixed to *expire at noon*; but the notes for the stipulated installments of the *extended* premium were taken as an accommodation to the party, and were to be paid at maturity in the ordinary signification of the term.

Mrs. Azema Leigh, Widow v. Knickerbocker Life Insurance Company, of New York, 436.

12. The growers of certain cotton shipped the same to the respective plaintiffs, by the New Orleans, Jackson and Great Northern Rail-

INSURANCE—Continued.

road. The cotton was destroyed by fire while in one of the railroad company's cars. The insurance company in which it was insured paid the loss, and the question is, whether the insurance company can recover its loss from the railroad company? It must be answered negatively.

There was no contract between the two companies; consequently there was no obligation from the one to the other. There was no conventional subrogation from the assured to the assurers, and there was certainly no legal subrogation by which payment by the one entitled them to payment from the other.

The insurance company paid the loss for which they received a premium for insuring against, to the persons who suffered the same. As there was no obligation between them and the railroad company, and as no obligation existed towards them from the railroad company, they have no claim against it.

D. R. Carroll & Company v. the New Orleans, Jackson and Great Northern Railroad Company, and Alcus, Scherck & Company v. The Same. Consolidated, 447.

13. On the twenty-first of April, 1868, the plaintiff wrote to Pemberton, president of the Merchants' Mutual Insurance Company, a letter to effect a policy on the steamer Texas. In that letter he said: "By agreement with Darden, he (Darden) was to insure the steamer and to transfer policy to me to the extent of \$5000. Darden effected insurance, failed to pay the policy, say, \$957 75, which I paid myself. Darden has since fraudulently sold his interest in the steamer as acquired from me, and she is now in the hands of the United States Marshal for debts contracted since sale and will be sold to-morrow. As I have paid for the policy and have now identically the same interest in the steamer that I had when the policy was taken, I desire to have the policy continued to the time of its expiration for the interest transferred to me, say, \$5000." The policy referred to was to run to the twenty-fifth of November 1868. On the twenty-third of September of the same year the vessel was totally lost by a peril insured against.

It appears that on the twenty-third of April, Pemberton had acknowledged receipt of plaintiff's letter of the twenty-first of the same month and said in a postscript: "The risk on steamer Texas to continue in force under the clauses and conditions of policy No. 2500. But in the meantime, on the twenty-second of April, during the interval elapsing between the date of plaintiff's letter and that of Pemberton's answer, the vessel, in accordance with admiralty proceedings, had been sold, and the proceeds were distributed in a *concurso* of claimants. Under such circumstances, the answer of

INSURANCE—Continued.

Pemberton had not the effect of continuing the insurable interest of the plaintiff, whose privilege and interest had been divested by the marshal's sale.

Such a defense is not precluded by the doctrine of estoppel. The letter of Pemberton did not change plaintiff's rights, or cause him to act so as to alter his previous position. It did not create a right or confer one which did not previously exist. It simply proposed to continue such rights as the plaintiff had under the policy. But after the marshal's sale, the plaintiff could have no right under that policy. His interest was transferred from the vessel to the proceeds. No new contract of insurance was made; no new or additional premium paid. The parties were simply mistaken as to the continued existence of plaintiff's insurable interest.

W. S. Pike, Assignee v. Merchants' Mutual Insurance Company, 505.

INTERROGATORIES.

1. The plaintiff's answers on facts and articles being obtained by defendant, these answers must prevail over all unsupported testimony of the defendant. *James Christian v. H. F. Vickers*, 693.

SEE GARNISHMENT, No. 5—*Thomas v. Fuller*, 625.

INTERVENOR.

1. The plaintiff being ostensibly the owner, under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner and as such entitled to both the property and its revenues, he must seek his remedy in a different direction.

B. K. Hunter v. M. J. Dunham et al.—T. H. J. Richardson, Intervenor, 141.

2. The intervenors have not in this case, as consignees, acquired a superior right to the cotton shipped to them, because it was attached by plaintiffs before the bill of lading was delivered to said consignees.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it, because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

Delop & Co. v. Windsor & Randolph—S. H. Kennedy & Co., Intervenor, 185.

3. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being

INTERVENOR—Continued.

mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

The position taken by the intervenors that they are the owners of the cotton and therefore entitled to its proceeds, contradicts their judicial admissions in their petition of intervention, and therefore can not be permitted. *Ibid.*

4. A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing seized; second, when he contends that he has a privilege on the proceeds.

In this instance it is not contended that the minors on whose behalf an intervention is made, own the property seized; and if they had a privilege on its proceeds, about which this court says nothing, it could only be enforced when the sale had been effected. It has not been shown that there is any law authorizing a judge to order, as he did, the sheriff to make no title to property to be sold under execution unless it bring the price fixed upon by him.

Desiree Hickman v. Amos B. Thompson, 260.

5. In the intervention of West, the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the district court was without jurisdiction *ratione materiæ*. If the property he claimed belonged to him, he should have sued for it in a court of competent jurisdiction.

J. P. Cross v. F. P. Parent. E. Parent and B. J. West, Interveners, 591.

6. The defendant, dative tutrix, alleging that the condition of the estate of her deceased husband required a sale of the property belonging to it, had it sold after the usual judicial proceedings, and purchased it all. She subsequently filed a tableau placing herself thereon as a creditor for a sum larger than the property was appraised at. This tableau was homologated. After the adjudication she mortgaged the property to certain individuals. One of the defendant's children prays that said sale be declared null and void. Payne, claiming to control said mortgage, intervenes to have said mortgage recognized and enforced.

The exception to the intervention on the ground that the demands made by the intervenor were not incidental to, or necessarily connected with, the actions between the parties, is not well founded. The foundation upon which the intervenor's mortgage rested, was the sale under order of court to the defendant. If the sale was null, his mortgage was null also, because the defendant would not have had any title to the property mortgaged. Although the judgment in this case, between the plaintiff and defendant, would

INTERVENOR—Continued.

not probably have been conclusive of his rights, he not having been a party to the suit, still he had such an interest in the result in the controversy as to entitle him to intervene.

The title to the property purchased by the defendant as stated, is, as to third parties, good and valid. Those who dealt with her did so under the faith of judicial proceedings. To set aside the sale made under the authority of justice and thus destroy the mortgage which was taken as the result thereof, and which was accepted in good faith, would be to make like proceedings snares instead of shields.

If plaintiff's tutrix has assumed responsibilities towards her, and has been derelict in the performance of any duty, the judgment of the district court in this case reserves her rights against said tutrix, and this is her only recourse.

Susan A. Webb v. Amelia E. Keller. Payne et al. Interveners, 596.

SEE HUSBAND AND WIFE, No. 9—*Barron v. Sollibellos, 289.*

JUDGMENT.

1. A judgment, after its transfer, may be executed in the transferrer's name, but if it be the transfer of a litigious right, as charged in this case, the debtor—the appellant herein—has not tendered payment of the price given, in order to put an end to litigation.

A. W. Walker v. E. Villaraso, 42.

2. The judge *a quo* can not be compelled by *mandamus* to reduce the amount of the bond fixed by him to set aside a judicial sequestration. A judge may be compelled by *mandamus* to act, in a particular case, but having acted, his judgment can not be revised except on appeal. One can not be compelled to change one's judgment in a matter where one has the right to judge.

State of Louisiana ex rel. Benton v. The Judge of the Superior District Court, parish of Orleans, 116.

3. A judgment signed in vacation is no judgment. Being no judgment, no appeal could be taken from it. Relator has the right to see that the judgment of which he complains be regularly signed.

State ex rel. S. D. Dixon, tutor v. Judge of the Fifth District Court, parish of Orleans, 119.

4. A judgment can not be annulled unless all the parties to it are cited.

John W. Willis v. Lewis L. F. Peet, 156.

5. The right of a garnishee to appeal for his own protection, has often been recognized by this court.

In this case of *Halpin v. Barringer*, judgment was rendered for plaintiff, and a *fi. fa.* having issued, Woelper was made garnishee. He answered that he had certain funds deposited in his hands, in a certain suit. Upon this answer, judgment was rendered against him. This judgment is wrong.

JUDGMENT—Continued.

The judgment in the case in which Woelper was made garnishee, was against Barringer individually, in so far as the record discloses. The money in the hands of the garnishee belonged to a succession, of which Barringer was administrator. It was not liable to seizure in satisfaction of a judgment against him, and the payment of such a judgment would not release the garnishee.

Patrick Halpin v. Jahn L. Barringer—W. Woelper, Garnishee, 170.

6. Where the defendant in substance confessed judgment for the greater part of the debt, leaving in contestation only the sum of two hundred and seventy-five dollars, an amount not within the jurisdiction of the appellate court, the motion to dismiss the appeal must prevail.

C. E. Girardy & Co. v. The City of New Orleans, 291.

7. The defendants invoke their title as purchasers by mesne conveyance from the succession of Elizabeth Clew through John F. Clew, who acquired the property from that succession under the last will and testament of Elizabeth Clew, duly approved, registered and executed by judgment of the Second District Court, and put in possession as universal legatee under that will, this action of the Second District Court of New Orleans being, as it seems, predicated upon the proof that the will of the decedent had been duly admitted to probate by a decree of the surrogate of the county of New York.

Rights acquired by third parties by virtue of a judgment which is rendered by a court of competent jurisdiction after fulfillment of all the legal forms and requisites, and which is final and executory, become, as a general rule, fixed and absolute, and can not be divested by a subsequent reversal of the judgment upon a devolutive appeal.

An exception to the above mentioned rule would be where fraud had been practiced in obtaining the final judgment and the party in interest was party to the fraud, or where fraud is apparent upon the record and could have been detected by an inspection of it. No exception of this sort is pretended to exist against the rights claimed by the defendants.

James B. Taylor et al. v. Charles Lauer et al., 307.

8. The fact that only one of the non-resident parties executed an appeal bond under an order in favor of all, can not invalidate the appeal taken by him. Those who are not appellants are appellees, and the appellant has the right to prosecute his appeal, which is regularly taken, although his co-defendants may acquiesce in the judgment; nor is it impossible to declare the judgment null and inoperative as to the appellants, and leave it undisturbed as to the others against whom it is rendered.

JUDGMENT—Continued.

One judgment debtor has the right to be relieved from an erroneous judgment, although his co-debtors in the judgment do not see proper to complain. The non-action of one does not prevent another from acting.

The exception to the jurisdiction of the court below, *ratione materiae*, should have been sustained, the interest of the plaintiff being less than five hundred dollars. Plaintiff has no greater right to annul or injoin in this proceeding the bonds issued by the police jury of the parish of Concordia, than if he were resisting the payment of his tax levied to pay the interest on the bonds, and as his whole tax, set forth in his petition, does not exceed five hundred dollars, the district court did not have jurisdiction of his demand.

George L. Walton v. Police Jury, parish of Concordia, et als., 355.
SEE MANDAMUS, No. 1—*Citizens' Bank of Louisiana v. A. Dubuclet*, 81.

SEE EVIDENCE, No. 5—*Bonella & Caballero et als. v. Charles Madual*, 112.

SEE EVIDENCE, No. 15—*Succession of Pipes*, 203.

SEE JURISDICTION, No. 3, 4, 5, 6—*R. C. Oglesby v. Wm. B. Helm*, 61.

SEE JURISDICTION, No. 7—*Succession of Harriet L. Vaughn*, 149.

SEE BONDS, No. 16—*Pottier v. Grant, et al.*, 283.

SEE SUBROGATION, No. 3, 4—*Dockham, Wife v. City of New Orleans*, 302.

SEE SEIZURES AND SALES, No. 12—*Galagher v. Abadie*, 343.

SEE LEASE, No. 2—*McCarthy v. Baze et al.*, 382.

SEE INSURANCE, No. 8—*Matthews v. Crescent City Mutual Insurance Company*, 386.

SEE ADMINISTRATOR, No. 10—*Succession of A. Decuir*, 222.

SEE ADMINISTRATOR, No. 14—*Thacker v. Dunn*, 442.

SEE TAXES AND TAX COLLECTORS, Nos. 12 and 13—*City of New Orleans v. Rawlins*, 470.

SEE TAXES AND TAX COLLECTORS, No. 14—*City of New Orleans v. Ker*, 491.

SEE CORPORATIONS, No. 7—*Killgore v. Nicholson et als.*, 633.

JURIES AND JURORS.

1. After the regular panel of jurors was exhausted, and only four jurors therefrom had been sworn, the district judge ordered the sheriff to summon and select one hundred talesmen to appear on the following day to complete the jury, and continued the case. The challenge to the whole array of talesmen when produced, was properly overruled.

State of Louisiana v. James Gallagher, 46.

JURIES AND JURORS—Continued.

2. If the jury can not be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court or its vicinity.

It is not said in the challenge that there were any bystanders present when the panel was exhausted, and this court is bound to presume, in the absence of proper evidence to the contrary, that the district judge and the officers of the court *a qua* did their duty. *Ibid.*

3. Where the assignment of error is that the judge *a quo* erred in overruling the motion of defendant to quash the panel of tales jurors, because they were selected by the sheriff and not drawn from the list of registered voters as the regular panel, it was

Held—That the facts, as to this matter, having not been brought up in a bill of exceptions, it must be presumed that the judge and sheriff did their duty. But this court can properly state in this connection that talesmen are not regular jurors and are not to be drawn and summoned as such. They are necessarily to be summoned without observing the formalities of drawing and summoning the regular panel.

State of Louisiana v. Austin E. Smith, 62.

4. Where the indictment recites that the grand jurors were duly impaneled and sworn, if it be sacramental for the expression, "upon their oath present," etc., to be used, this court has no doubt it was so used—the whole of said expression being in the transcript except the word "oath"—which is necessarily a clerical error.

Ibid.

5. Where the exception was to the refusal of the judge *a quo* to send the jury back for further deliberation, after the jury had returned a verdict of guilty against the defendant Gaetano Rosa, accompanied with the recommendation of mercy—the request being predicated upon the declaration of the foreman of the jury that, in rendering the verdict with recommendation to mercy, it was expected that the court might be enabled to inflict a milder sentence;

Held—That the exception is not well founded and must be overruled.

The court *a qua* decided correctly that the jury was sworn to bring in a verdict, and that the recommendation to mercy was mere surplusage.

State of Louisiana v. Gaetano Rosa and Rosa Rosa, 75.

6. Neither injury nor fraud having been alleged or shown, resulting from the venire, or drawing of the jury, or from any other irregularity on the trial of the defendant, no relief can be obtained by him under the ninth section of the act No. 94 of the acts of 1873, entitled "an act relative to juries," etc.

State of Louisiana v. Hamilton Miller, 579.

JURIES AND JURORS—Continued.

7. The challenge of a juror by the plaintiff because he could not read or write the English language, was not a good ground of challenge, but as it is not contended that defendant has suffered by the ruling of the judge *a quo*, it can not be declared a sufficient reason for reversing the judgment and verdict, and ordering a new trial. *Citizens' Bank of Louisiana v. J. Strauss*, 736.

SEE CRIMINAL LAW, No. 9, 10 and 11—*State v. Carro*, 377.

SEE CRIMINAL LAW, No. 19—*State v. Hooser et als.*, 599.

JURISDICTION.

1. This case was originally brought before the parish court of Jefferson. Defendants excepted to the jurisdiction on the ground of the amount claimed, which they alleged to be above \$500. The exception was overruled, when the parish of Jefferson being divided, and a part of it being annexed to the parish of Orleans, the suit was transferred to the Fifth District Court of the latter parish. The same original exception being raised there, was set aside on the ground that it had already been passed upon by the court from which the case was transferred.

This is an error. The suit should have been dismissed for want of jurisdiction of the parish court. The district court took the case as it was originally presented. It follows therefore that the court before which the defendants were cited not having jurisdiction over them, they were never subject to it, and not being under its jurisdiction, no judgment could properly be rendered against them.

Louis Parker v. Shropshire & Anderson, 37.

2. Where the object of the suit is to cause the defendant to vacate premises, the occupancy of which he claims under a lease, and neither party claims a money judgment, it is the amount of the lease which gives jurisdiction to this court. That amount not being sufficient, the motion to dismiss the appeal must prevail.

Arnold Ellis et als., Trustees v. Solomon Silverstein, 47.

3. Where an application is made for the revision of a judgment for five hundred dollars and costs of suit, this court, of its own motion, must dismiss the appeal on account of a want of jurisdiction *ratione materiae*.

R. C. Oglesby v. William B. Helm, 61.

4. In order to determine the jurisdiction of the court, the amount in dispute at the time the suit was filed, alone must be considered. Costs, subsequently accruing, can not be estimated so as to give this court jurisdiction. *Ibid.*

5. An action not revisable by an appeal is not revisable in this court by an action of nullity, or by an appeal from the judgment in the action of nullity. *Ibid.*

6. This court not having jurisdiction of a judgment because the

JURISDICTION—Continued.

matter in dispute did not exceed five hundred dollars, has no jurisdiction to revise it in either of the modes prescribed by the Code of Practice. *Ibid.*

7. In the succession of Harriet L. Vaughn, the proceeding instituted by Mrs. Gilbert for the sale of property of the succession, by virtue of a judgment rendered in the Fifth District Court against said succession, is opposed by the heirs of the deceased on the ground that the judgment is absolutely null and void.

The district court having acted within its jurisdiction, the judgment rendered in favor of Mrs. Gilbert, whether sufficient proof was administered or not, was not an absolute nullity. The amount involved in that judgment is beyond the jurisdiction of the parish court; and the correctness of the demand upon which it is based, or the question of the sufficiency or insufficiency of the proof in support thereof, can not be adjudicated by the parish court for want of jurisdiction. Besides, a parish court can not revise the judgment of a district court.

Succession of Harriet L. Vaughn—On opposition to a rule to sell property to pay debts, 149.

8. Assuming that the exceptions filed to the original rule in this case by the defendant, Mrs. Pipes, are well taken, and that at that time the parish court had no jurisdiction *ratione materiæ* or *ratione personæ*, her subsequent appointment as administratrix, which she provoked, brings the succession within the control of the parish court, and she has therefore subjected herself to its jurisdiction.

Succession of James W. Pipes, 203.

9. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section nine of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

10. In 1861, by an act of the Legislature, a part of the territory of the parish of Madison, embracing the plantation claimed in this suit, was transferred to the parish of Tensas after the decease of the owner, who died in 1855.

In 1867 an attempt was made to open the succession of the deceased in the parish of Tensas, by appointing a curator of absent heirs, who caused the property to be sold to pay debts, as it is alleged. It is through this sale that the defendant claims to hold.

The probate court of Madison parish, where the deceased had his domicile at the time of his death, had exclusive jurisdiction of his succession. Everything done in that succession in the parish of Tensas was therefore null and void.

Bettie Clemens, Guardian, etc. v. Francis Augustus Comfort, 269.

JURISDICTION—Continued.

11. This is made up of separate suits; the judgments were separate; and in none of the cases were \$500 demanded. They were consolidated and taken as it was merely for convenience. It follows that this court has no jurisdiction.

George Collins et als. v. Mississippi and Mexican Ship Canal and Draining Company, 276.

12. Plaintiffs agreed to furnish defendants with the means of supplies required to make a crop. Defendants agreed to ship their crop to the plaintiffs. Defendants made their crop and sent a portion of it to New Orleans, within the jurisdiction of the court *a qua*, to another person than the plaintiff. Said portion of the crop, on which plaintiffs claimed the furnishers' privilege for supplies, was sequestered by them.

The Seventh District Court erred in entertaining jurisdiction, because the domicile of the defendants was in the parish of St. Bernard. The conservatory order of sequestration was improperly granted, and, at the trial, should have been set aside and the suit dismissed.

The court, having no jurisdiction of the persons of the defendants, had no authority to determine either the amount or character of the demand set up against them by the plaintiffs; it could not decide that the defendants were indebted to plaintiffs in any specific sum, and that there was the furnisher of supplies privilege on the cotton sequestered.

P. Bradley & Co. v. Mrs. S. A. Woodruff and John McOrea, 299.

13. The defendants object that a dispute among the owners relative to the employment and sale of a vessel belongs exclusively to the admiralty jurisdiction, and that the State courts are without jurisdiction. That is not the question involved in this case. It is whether the defendants shall pay damages for breach of the contract of partnership, and also whether there shall be a settlement of partnership.

Richard Francis v. William Lavine et als., 311.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has

JURISDICTION—Continued.

prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thos. J. Emerson and Geo. F. Porter, 351.

16. It appears that Duggan & Guyol, against whom a personal judgment is sought, and whose cotton was sequestered, reside in the parish of East Baton Rouge. The Fourth District Court, parish of Orleans, whose proceedings are now under revision, was without jurisdiction to try this case.

This court, of its own motion, will notice the want of jurisdiction of the court *a qua*.

Guyol & Montegut v. Duggan & Guyol and Patton & Duggan, 529.

16. This is a suit on a promissory note secured by pledge. It is brought against the defendant, as a resident of the parish of Iberville, and was served on him personally in the parish of Orleans. As it is a personal action, unattended with any conservatory writ, the court *a qua* was clearly without jurisdiction against defendant.

Henry T. Sorrel v. Henry Laurent, 554.

17. The exception to the jurisdiction of the court of Concordia came too late after issue joined. It should have been made *in limine litis*.

Milton Wilson v. J. P. Benjamin et als., 587.

18. In the intervention of West, the judgment in his favor was an absolute nullity; the matter in dispute in his intervention being less than five hundred dollars, the district court was without jurisdiction *ratione materiæ*. If the property he claimed belonged to him, he should have sued for it in a court of competent jurisdiction.

J. P. Cross v. F. P. Parent—E. Parent and B. J. West, Interveners, 591.

19. Where the execution under which the sale was to be made issued from the parish court, it is in that court that the disposal of the proceeds must be determined. The exception to the jurisdiction was properly taken.

A. Berard, Administrator v. C. Young, Sheriff, et als., 598.

20. Where it is evident that the basis of the action is the right to an account to be rendered by the testamentary executor, this court will, *ex proprio motu*, decide that the district court which rendered the judgment, had no jurisdiction *ratione materiæ*. In this instance it is the demand of parties claiming to be heirs, in a succession under administration, and it should therefore have been instituted in the parish court.

Euphrasie Pelagie G. Tessier v. Robert Hart Littell, Testamentary Executor, 602.

JURISDICTION—Continued.

21. As to the sufficiency of the proof to sustain the charge of murder against the defendant, this court can not revise the judgment, because its appellate jurisdiction is limited to questions of law.

State of Louisiana v. Ozeme Fruge, 604.

22. If the plaintiffs have any rights in the land, a portion of which they claim by suit in the parish court, these rights descend to them from one succession which was opened in 1816, and another which was opened in 1859. Neither of these successions now exist. They have been closed. The property sought to be divided is alleged to be worth \$50,000. Under this state of facts the parish court was without jurisdiction.

Clet Provost et als. v. Ursin Provost, 611.

23. The parish court having made the appointment of tutor, and having jurisdiction of the tutor's administration, is the proper tribunal in which the tutor should be called on to account for and deliver the property of the minor to a legal representative of said minor.

The plaintiff, having satisfactorily exhibited evidence of his appointment as guardian of a minor in the State of Georgia, is entitled to sue for and recover the property in this State belonging to his ward.

The appointment of the defendant as tutor, contradictorily with and on the opposition of plaintiff's predecessor, did not conclude such predecessor, or the plaintiff, his successor, from asserting the right set up in this action, which is different from that involved in the former contest; nor was it necessary for the plaintiff to show before instituting this suit that no debts existed against the minor. Protection is provided in this respect by the Code.

David Bowen, Guardian v. F. E. Callaway, Tutor, 619.

24. It has been invariably held by this court that its jurisdiction can only attach by appeal properly taken, and that it has not a supervisory control over the inferior tribunals.

State of Louisiana ex rel. City of New Orleans et al. v. The Judge of the Superior District Court, parish of Orleans, and W. E. Murphg, 750,

SEE OFFICES AND OFFICERS, No. 11—*State ex rel. Cormick, v. Richardson*, 631.

SEE APPEAL, No. 8—*James J. O'Hara v. Succession of John Davidson*, 76.

SEE HUSBAND AND WIFE, No. 8—*Eliza Rainey v. Fanny Asher*, 262.

SEE MORTGAGE, No. 9—*Guilbeau v. Wiltz*, 600.

SEE GARNISHMENT AND GARNISHEES, No. 4—*Smith v. Durbridge*, 531.

SEE JUDGMENT, No. 8—*Walton v. Parish Jury of Concordia*, 355.

SEE ADMINISTRATOR, No. 14—*Thacker v. Dunn*, 442.

SEE APPEAL, No. 28—*Dugan et al. v. Police Jury of St. Charles*, 673.

LAWS AND STATUTES.

1. The second section of the immigration law of the State, enacted March, 1869, and re-enacted in the Revised Statutes of 1870, section 1722, is not in conflict with the constitution of the United States, which gives to Congress the exclusive right to regulate commerce with foreign nations and among the several States and with the Indian tribes. The State law in question is not a regulation of commerce between foreign nations, but a police regulation which the State may properly adopt for the protection of its own citizens.

In regard to the bonds exacted by said immigration law, their execution can not be enforced, no penalty being prescribed for refusal to execute them.

Commissioners of Immigration v. O. L. Brandt et als., 29.

2. This suit was brought under the second section of act No. 68, session of 1869, p. 67, which provides that it shall be unlawful for any person other than the master and wardens of the port of New Orleans, or their legally constituted deputy, to make any survey of hatches of seagoing vessels coming into the port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates or orders for the sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for the master and wardens to do and perform.

The section above referred to is not unconstitutional. The Legislature may not have the power to force a vessel which comes to this port from sea to have a survey made of her hatches, but it has the right to designate by whom a survey shall be made, if one is asked for by the captain or owner of the vessel. This is not a tax upon commerce. It is only saying by what officer a certain act shall be performed.

When the law says it shall be unlawful for any person to do a particular thing, the party who attempts to do it may be enjoined by any person in interest.

Master and Wardens of the Port of New Orleans v. Robert W. Foster, 105.

3. The taxes of the years 1867 and 1868 became due at least by the first day of December of these years; they were assessed respectively in the same years—the taxes for 1867 in 1867—those for 1868 in 1868.

Under the revenue act, approved April 4, 1865, numbered 55, and entitled “An Act to provide for increasing the revenue of the State and raising means to pay the interest on the State debt,” the lien and privilege for taxes dated from the first Monday of July

LAWS AND STATUTES—Continued.

of the year for which the taxes were assessed, and continued for two years.

But the revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the continuance of the tax list to five years from the first of April of the year for which the taxes may be assessed. The last section of said act provides that it shall go into effect on the first day of January, 1869, and repeals, from and after its going into effect, all laws and parts of laws contrary to its provisions.

Dunlop & McCance v. Henry D. Minor et al.—Edward C. Palmer, Third Opponent, 117.

4. It was competent for the Legislature to lengthen the term of prescription in regard to tax liens. The act of 1868 is not understood by the court as repealing the thirty-second section of the act of 1865, but only as extending the duration of the lien.

The question of prescription must, in this case, be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription, and the other portion has passed under another and different term. According to this method, it is found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed. *Ibid.*

5. The defendant's objection is, that the law under which the parish tax is levied on retail liquor dealers in the parish of East Feliciana, is violative of the one hundred and eighteenth article of the State constitution, because the tax is not uniform, inasmuch as it is regulated by the amount of business which is done; those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5000, another sum, and so on. This objection is fatal.

Parish of East Feliciana ex rel. J. Oscar Howell, Tax Collector, v. John Gurth, 140.

6. Section 8 of act No. 47 of 1873, which disqualifies as a witness a delinquent taxpayer, published as such for thirty days, is unconstitutional.

This provision of the act under consideration is a regulation or rule of evidence enacted by the Legislature. The title of the act should then give some indication of it, which it does not. No one upon reading that title would imagine that the act contained any provision upon the rules of evidence or the right to be a witness in a court of justice. *John I. Adams v. Asa Webster, 142.*

7. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform

LAWS AND STATUTES—Continued.

per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector, v. Charles McVea, 151.

Tax Collector, 154.

8. In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects, *Succession of Henderson Randall*, 163.

9. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

Delop & Co. v. Windsor & Randolph—S. H. Kennedy & Co., Interveners, 185.

10. The proceeding to remove an administrator and force him to account is probate in its character, and the parish court had jurisdiction of the suit. The penalty inflicted under section 9 of the Revised Statutes of 1870 is only an incident to the suit.

Succession of Daniel Williams—Mrs. Sarah A. Williams, Administratrix, Opponent, 207.

11. Under the act of 1858 the promise to pay the debt of a third person can not be proved by parol. It must be in writing, the law is prohibitory, and this court can not recognize any other proof to establish the fact.

Baker & Thompson v. Mrs. A. L. Pagaud, 220.

12. In the State of Mississippi a sale of personal property is complete by the mere consent of the parties and without delivery.

The cotton claimed in this case appears to have been made on Langley's place, and Tribble was to have an interest in the crop for his services—which interest was to be ascertained by arbitration. Before the arbitration Langley sold to the plaintiff. That sale vested the title to the cotton in Taylor, the plaintiff, and the attempt of the agents of Tribble to sell to the defendants was null, being the sale of the property of another.

W. B. Taylor v. Twenty-five Bales of Cotton and Blakemore, Woolbridge & Co., 247.

13. One of the defendants, A. L. Gusman, moved in the court below to transfer this case to the Circuit Court of the United States, on the ground that he is a citizen of the State of New York, and has that right under the act of Congress approved July 27, 1866, entitled "An Act for the removal of causes in certain cases from the

LAWS AND STATUTES—Continued.

State courts." It appears that there are two defendants besides the one making the application for the removal and that they are citizens of this State.

This being the case, it results from the decision of the Supreme Court of the United States, in the case of *Coal Company v. Blatchford*, 11 Wallace p. 172, that the case is not transferable under the said act of Congress.

Mrs. Corinne Tesson and Husband v. A. L. Gusman et als., 248.

14. Under section third of act No. 2 of the acts of 1870, creating the Eighth District Court, the injunction granted in this case by the Fourth District Court was very properly dissolved with damages. Besides, that court had no authority to restrain the trial of defendant's suits before a justice of the peace.

Spalding, Bidwell & McDonough v. Rhoda Rosewood, 341.

15. The plaintiff in this case was not a party to the suit in the Fifth District Court, the execution of whose judgment she has enjoined. Under the Act of 1870, which organized the Eighth District Court, that court has the power to issue the injunction plaintiff has prayed for. Perhaps, under that statute, she might have applied to the Fifth District Court, but it is thought that she could also seek relief from the Eighth District Court.

Emily J. Robertson v. Thomas J. Emerson and George F. Porter, 351.

16. The peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act under which this suit is brought is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873, is not well taken.

There is no conflict between the essential provisions of the two acts; the only points of difference are that the latter act is of a less general application and the proceedings under it of more summary character. According to the return of both Returning Boards for the election held in November, 1872, the defendant was defeated. It is clear that the defense is without merit.

State ex rel. P. P. Carroll v. Philogene Jorda, 374.

17. A thorough examination of the question has led this court to the conclusion that the State has the power to grant to a railroad company the right of way through a street in the city of New Orleans.

New Orleans, Mobile and Chattanooga Railroad Company v. The City of New Orleans et als., 517.

18. Neither injury nor fraud having been alleged or shown, resulting from the venire, or drawing of the jury, or from any other irregularity on the trial of the defendant, no relief can be obtained by

LAWS AND STATUTES—Continued.

him under the ninth section of the act No. 94 of the acts of 1873, entitled "An Act relative to juries," etc.

State of Louisiana v. Hamilton Miller, 579.

19. Under the act of Congress, July 17, 1862, known as the confiscation act, and the joint resolution of the same date, explanatory of it, only the life estate of the person for whose offense the land has been seized, is subject to condemnation and sale.

When such person has, previously to his offense, mortgaged his land to a *bona fide* mortgagee, the mortgage is not divested. His estate and property in the land being but the land subject to the mortgage, any sale made in pursuance of the act passes the life estate subject to the charge.

T. Micou et al. v. J. P. & J. Benjamin and L. Madison Day, 718.

SEE EVIDENCE, No. 52—*State v. Widow de St. Romes*, 753.

SEE BONDS No. 19—*State v. Clinton and Dubuclet*, 346.

SEE COLORED PERSONS, No. 1—*O. Hart v. Hoss & Elder*, 90.

SEE POLICE JURIES, No. 3—*Nathan Lorie v. Bennett Hitchcock*,

SEE DONATIONS, 1, 2, 3—*Succession of Thomas Hale*, 195.

SEE CORPORATIONS, No. 4—*State v. Accommodation Bank of Louisiana*, 288.

SEE POLICE JURIES, No. 4—*Morgan & Co., v. Police Jury of parish of Rapides*, 281.

SEE LOCUS PUBLICUS No. 2—*New Orleans Sugar Shed Company v. Harris*, 378.

SEE BATURE No. 1—*Winter v. City of New Orleans*, 310.

SEE CRIMINAL LAW, 9, 10, 11—*State v. Frank Carro*, 377.

SEE CRIMINAL LAW, No. 13, 14—*State v. Shonhausen*, 421.

SEE SHERIFF, No. 5—*Adams v. Dinkgrave et als.*, 626.

SEE COURTS No. 1—*State ex rel. Collens v. Clinton*, 406.

SEE OFFICES AND OFFICERS, No. 9—*State ex rel. Claiborne v. Parlange*, 548.

SEE OFFICES AND OFFICERS, No. 11—*State ex rel. Cormick v. Richardson*, 631.

SEE TAXES AND TAX COLLECTORS, No. 16—*City of New Orleans v. Estate of Burthe*, 497, and No. 17—*City of New Orleans v. Louisiana Mutual Insurance Company*, 499.

SEE TAXES AND TAX COLLECTORS, Nos. 18 and 19—*State v. Maginnis*, 558, and Nos. 20 and 21—*State v. Clinton and Dubuclet*, 561.

SEE TAXES AND TAX COLLECTORS, Nos. 28 and 29—*Morrison v. Larkin*, 699.

LEASE.

1. Where the object of the suit is to cause defendant to vacate premises, the occupancy of which he claims under a lease, and neither

LEASE—Continued.

party claims a money judgment, it is the amount of the lease which gives jurisdiction to this court. That amount not being sufficient, the motion to dismiss the appeal must prevail.

Arnold Ellis et als., Trustees v. Solomon Silverstein, 47.

2. In this suit Lloyd has intervened and claimed the property seized. He had leased the office in which the movables were found to defendants. At the time of the lease some of the property seized was in the office. This property, belonging to Lloyd, was not subject to plaintiff's judgment, and the court *a qua* did not err in so deciding.

The balance of the property Lloyd claims under a bill of sale from the defendants, who, at the time of the sale, were in his debt for rent. The property, however, remained in the possession and under the control of the defendants. Lloyd alleges that it so remained with them as his agents. But there was no delivery, and this was essential. Therefore, on this point, the decision of the judge *a quo* against the intervenor is correct.

There was error, however, in condemning Lloyd to pay the costs. A portion of the property belonged to him. He enjoined the sale thereof. Judgment having been rendered in his favor for a part of the claim, the costs should have followed the judgment.

L. McCarthy v. G. Baze et al.—R. Lloyd, Third Opponent, 382.

3. The defendant was not justified in refusing to pay rent to plaintiff, on the ground that the house he leased from her was not put in repair, according to contract. His remedy was to put his lessor in default and make the repairs, deducting the amount thereof.

Under this view of the case, the ruling of the judge *a quo*, refusing to hear testimony as to the repairs that were necessary, was correct.

Mrs. M. E. Winn v. J. F. Spearing, 384.

4. The defendant clearly had no right to make material alterations in the leased premises without express permission. The injunction he appeals from did not restrain him from the exercise of any of the privileges and facilities he was entitled to by the terms of the lease.

Edward T. Denechaud v. Jean Trisconi, 402.

5. The plaintiff having acquired the right in his own interest, during the continuance of the lease of a part of a building, to prohibit the establishment of a grocery in the adjoining part of said building, in order to prevent competition with one of his own which he kept, was certainly at liberty to waive that right, and it is hard to see why such a waiver should not be a sufficient consideration for a contract entered into for the benefit of the person who desired such waiver.

Jean Trisconi v. A. D. Dumas and Francois Victor, 477.

LEASE—Continued.

6. This is a suit in damages on the allegation of having been maliciously ejected from leased premises. When a tenant denies the title of his landlord, the relation between them is severed, and the right of entry by the landlord is complete, but the entry must be effected under the law.

In this case it is not necessary to decide whether the manner of getting possession was proper or not, as the facts show that plaintiff was not damaged thereby. He failed to pay his rent, and under our law and jurisprudence the defendant was justified in seizing for the rent and attaching the property subject to the lease. In doing this in a legal manner, the defendant did not render himself liable in damages.

O. C. Thayer v. Rufus Waples, 502.

7. Short & Martin, a commercial firm, executed their notes for the rent of a store. Shortly after, Short withdrew from the partnership, and John A. Hall became a member of the former firm of Short & Martin. The new firm carried on their business in the same store leased by Short & Martin. It is clear that Hall is not bound for the notes of Short & Martin, unless he assumed to pay their debt. This assumpsit can only be established by written evidence, and that evidence has not been furnished.

The sequestration of the personal property of Hall, after it had been removed from the leased premises, for the payment of the debts of Short & Martin, was unauthorized. Whether the property seized had been removed from the leased premises, within fifteen days or not, is unimportant, inasmuch as the property did not belong to Short & Martin, the lessees.

Margaret A. Silliman v. Short & Martin and J. A. Hall, 512.

8. The lessor can not seize movables belonging to a third person, which have been removed from the leased premises within fifteen days before the seizure. It is the property of the lessee alone which can be seized under such circumstances.

John Hughes and Wife v. Charles F. Caruthers. Mrs. Ann M. Hennen, Third Opponent, 530.

9. The thing leased being destroyed in part by fire, the defendant had the right, under article 2697 of the Revised Code, either to demand a diminution of the price, or a revocation of the lease. He preferred the latter. In according to the defendant the exercise of a plain legal right, the court below committed no error.

Higgins & Maurer v. J. C. Wilner, 544.

SEE PLEADINGS No. 8—*Rochereau & Co. v. Mrs. Lewis and Husband*, 581.

LEASE, LESSOR AND LESSEE.

10. The possession of the lessee being only that of his lessors, when the fact was disclosed by the answer of the lessee, who is defendant in this instance, his lessors should have been made parties to the suit which is a hypothecary action against lands alleged to be mortgaged in favor of the plaintiff and owned by the lessors of defendant. No valid judgment could be rendered in the case without the parties interested being before the court.

D. O'Bryan, Agent v. George McVey, 608.

11. The question in this case is, whether at the expiration of a three years' lease, the defendant delivered a certain plantation with its buildings and appurtenances in a good state of repair, as he had bound himself to do.

Plaintiff having excepted to the introduction of testimony to show that the boards which were retained on one side of the house were as good as new, the judge *a quo* erred in maintaining the exception. The defendant's contract was to cover the house with good boards. Whether the boards were old or new matters not.

The judge *a quo* did not err in refusing the defendant the right to prove in what condition the leased premises were when he took possession of them. Whatever their condition was then, his obligation was to restore them in good repair. Neither did he err when refusing to admit in evidence plaintiff's receipt for rent. She was not suing for rent but damages. There was error, however, in refusing to prevent the defendant to establish that, when the money for the lease was paid, the plaintiff expressed herself satisfied with the condition of the premises.

The judge *a quo* erred also in not permitting the defendant to prove that the matters involved in this suit had been adjusted before proceedings were taken. His payment of the rent may have been made only upon the stipulation that it was to be regarded a final settlement between them.

It was proper to reject the testimony offered to prove that the fences of the leased premises were in as good condition as those of the neighbors; that they were sufficient to keep the stock in as well as out; that their state of dilapidation was the result of natural decay, etc. The only question was whether they were in a good condition at the expiration of the lease.

Mrs. Martha Grayson, Administratrix, and in her own right v. John Buie, 637.

LEGATEES.

1. The question in this instance is, whether the plaintiffs, as the particular joint legatees of the Hapaca plantation, are entitled to the revenues thereof from February, 1867, to the time of its delivery to the said legatees in September, 1873.

LEGATEES—Continued.

The second clause of article 1626, R. C. C., provides that "the particular legatee can take possession of the thing bequeathed, or claim the proceeds or delivery thereof, only from the day the demand for the delivery was formed, according to the order herein before established, or from the day on which that delivery was voluntarily granted to him."

It is admitted in this case that there is no express bequest of the revenues accruing prior to delivery; that no judicial demand was made for the delivery; and that no corporeal delivery was made until September, 1873; but plaintiffs rely on what they call a constructive delivery by the executors. Even if it were conceded that a constructive delivery can be made by executors, it is on record that by a special agreement with plaintiffs, the right to claim such constructive delivery was waived by said plaintiffs. It follows that under the provisions of the above cited article of the R. C. C., the revenues of the Hapaca plantation accruing before delivery, can not be successfully claimed by plaintiffs.

Mrs. Eveline M. May, wife et al., v. Ogden and Stansbrough, Executors, 239.

LOCUS PUBLICUS.

1. The only question presented in this suit was decided in the case of *Marquez v. The city of New Orleans*, 13 An. 320. The court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the proprietors on the north side. That case and the one at bar seems to be identical.

Gabrielle Correjolles v. Succession of Louis Foucher, 362.

2. The capital of the plaintiffs is invested in a sugar shed constructed on a *locus publicus*, pursuant to a contract with the city of New Orleans. They have two hundred and forty thousand dollars of capital invested in the enterprise; they employ this sum in administering the business of keeping a sugar shed on this *locus publicus*. Such an investment can not fairly be considered as an investment in real estate within the meaning of act No. 42 of the acts of 1871.

If the plaintiffs had invested their capital in and become owners of real estate to the amount thereof, it would be manifestly unjust to assess that property and at the same time to tax the sum so invested as capital stock.

Under the provisions of the act in question, intended to exempt property from double taxation, no warrant whatever can be found in

LOCUS PUBLICUS—Continued.

support of the pretensions of the plaintiffs in regard to an entire exemption of their property from taxation.

New Orleans Sugar Shed Company v. H. H. Harris, Tax Collector, 378.

3. The mere fact that for thirty or forty years the public was permitted to pass over a certain piece of land, would not of itself constitute the place a *locus publicus*. The property which is the object of this litigation has never been dedicated to the public, nor has any expropriation taken place. Therefore it remains private property. *Charles Morgan v. G. Lombard*, 462.

MANDAMUS.

1. The Citizens' Bank, obtained, by mandamus proceeding against the State Treasurer, a judgment in the Superior District Court, ordering him to pay the bank \$200,000, and the plaintiff now prays that an injunction issue to restrain the Treasurer from paying any warrant or warrants out of the general fund, until he shall have paid the petitioner the said sum of \$200,000.

The position taken as to the right to question in this suit the validity of plaintiff's claim, which is based on a final judgment, is correct; but the remedy sought by injunction can not be accorded. This is not the mode of enforcing or executing a judgment in a mandamus suit.

Citizens' Bank of Louisiana v. A. Dubuclet, State Treasurer, 81.

2. The judge *a quo* can not be compelled by mandamus to reduce the amount of the bond fixed by him to set aside a judicial sequestration. A judge may be compelled by mandamus to act, in a particular case, but having acted, his judgment can not be revised except on appeal. One can not be compelled to change one's judgment in a matter where one has a right to judge.

State of Louisiana ex rel. Benton v. The Judge of the Superior District Court, parish of Orleans, 116.

3. This court can only mandamus a district judge for the purpose of maintaining and enforcing its appellate jurisdiction.

State ex rel. Richard Taylor v. The Judge of the Superior District Court, parish of Orleans, 121.

4. The objection that this is a suit against the State, for the instituting of which permission has not been obtained from the Legislature, is not well founded. It is a mere application to a court of competent jurisdiction asking for a writ of mandamus against an officer of the State, commanding him to perform one of the duties of his office, to wit: to pay the sums which the Auditor, in conformity to law, has ordered him to pay.

The warrants held by the relator are sufficiently described. Their

MANDAMUS—Continued.

number, date, amount, and in whose favor they were issued, are specifically set forth, and the petition alleges that they were judicial warrants. The list containing these details was offered in evidence and received without objection, and there is no charge that they are spurious, and that the signatures thereto are not genuine.

No law has been exhibited which requires the Treasurer to give preference of payment to warrants of older date and lowest number, nor has it been shown that such has been the practice in the Treasurer's office. On the contrary, it has been the reverse.

It has been shown to this court that, while its doors remained hermetically closed against certain *bona fide* creditors of the State, it lay all unlocked to the occasions of others, who had no right of precedence over their competitors. All men are equal before the law, and all men, having equal claims upon the State for the payment of a common debt, have equal rights upon the common treasury.

State of Louisiana ex rel. E. Merle v. A. Dubuclet, Treasurer—

State ex rel. John Ohapus v. The Same—Consolidated, 127.

5. A mandamus can properly issue against the Treasurer only when he has money, and illegally withholds it from one entitled to be paid. If he refuses to pay one creditor of the State and gives an illegal preference to another and pays to him all the money in his hands, he may make himself amenable to the law, which fixes his duty and imposes heavy penalties for the dereliction of that duty, but it is not a proper case for a mandamus.

To order the Treasurer in this proceeding, and under the circumstances of the case, to pay whenever the treasury may be replenished, is equivalent to a judgment on an ordinary proceeding, and would give in effect a preference to the relator, or is tantamount to an order in advance to the Treasurer to do what he has not refused to do, and what it must be presumed he will do, until the contrary be shown, as the presumptive evidence is in favor of an officer doing his duty. *Ibid.*

6. The defendant can not be proceeded against by mandamus to pay into the parish treasury \$5000 which he has collected as tax collector.

State of Louisiana ex rel. P. A. Simmons, President, and Charles Leroy, Treasurer v. D. H. Boullt, 259.

7. The writ of mandamus, it has been settled, may issue to compel a public officer to perform a mere ministerial duty; but it must clearly appear that the duty is one which from its character leaves no discretion in the officer to do or not to do.

MANDAMUS—Continued.

Here it does not clearly appear from the record that it is absolutely the duty of the respondent to do the things required of him. He avers that the contract asserted by the relator is null and void, and he annexes his affidavit of the truth of his averments. It is not his duty to execute an illegal and void contract, knowing it to be such.

State ex rel. Romaine v. J. R. West, Administrator of Public Improvements, and City of New Orleans, 322.

MARRIAGE.

1. Margaret Morgan, the surviving wife and natural tutrix of the child of the deceased, opposes a creditor's application for the administration, and claims it in her own right and as tutrix of her child.

In the absence of proof to the contrary, it will be presumed that the laws of Mississippi were the same as those of Louisiana on the status of slavery, and that the laws of both States did not authorize slaves to enter into contracts of marriage, so as to create any civil effects.

Therefore, the fact of deceased having married while a slave in Mississippi, did not prevent, notwithstanding the former wife still continued to exist, his lawfully marrying Margaret Morgan in Louisiana, where he resided after his emancipation. Besides it is not in evidence that Margaret Morgan knew of his having another wife when he married her.

Succession of Henderson Randall, 163.

SEE COLORED PERSONS, No. 1—*C. Hart, Tutrix v. Hoss and Elder, 90.*

SEE EVIDENCE No. 5—*Bonella & Caballero et als. v. Charles Maduel, 112.*

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MONITION.

1. At a succession sale of the property of the estate of Horace Groves, deceased, made in the parish of Tensas, on the eighteenth of April, 1868, a certain tract of land was adjudicated to E. Slicer. He afterwards sold the land to Mrs. Julia Scott, who obtained a monition in the parish of Tensas to secure her title, and said monition was homologated by judgment of the district court on the twentieth of October, 1873, from which judgment an appeal has been taken by certain heirs of the deceased, on the ground that said succession had been fraudulently opened in the parish of Tensas, when it was well known that it had been opened and was being administered in the parish of Madison, where the land in question was situated, before its being subsequently located in the

MONITION—Continued.

parish of Tensas, in consequence of a change of boundaries by virtue of an act of the Legislature.

In this case, Mrs. Julia Scott seeks by a monition taken out in the parish of Tensas to defeat a claim set up against her in the district court of the parish of Madison for the very tract of land sought to be disencumbered of all adverse claims by the monition. To this petitory action of the appellants in the district court of the parish of Madison, Mrs. Scott had answered, and when this suit was in progress in the proper court, she applied for a monition in another parish. It would be subversive of all propriety of legal proceeding if Mrs. Scott could by a flank movement of this sort conclude the rights of the appellants and confirm irrevocably her title to the land.

The appellants are not therefore affected by the judgment homologating the monition. Their judicial demand, claiming to be the owner of the land, was to all intents and purposes as effectual notice to Mrs. Scott, as if they had presented themselves in the parish of Tensas and made a formal opposition to the monition.

Mrs. Julia Scott and Husband v. The World, 285.

MORTGAGE.

1. The special mortgage given by the natural tutrix of the plaintiffs in 1858 was strictly in conformity to law, and the tacit mortgage sought to be enforced against her or those who hold under her was legally extinguished.

It is well settled that the holder of property under recorded titles, can give a valid mortgage thereon where the mortgagee has acted in good faith, and the transaction is a real one, regardless of the simulation of the mortgageor's title.

Cora and Louisa Brusle and Husband v. Mrs. Levinia Jane Hamilton, widow of R. O. Downes ; O. P. Hebert Intervenor, 144.

2. The intervenors have not in this case, as consignees, acquired a superior right to the cotton shipped by them, because it was attached by plaintiffs before the bill of lading was delivered to said consignees.

The intervenors had no lien on the cotton in Mississippi by reason of having furnished supplies to raise it, because it is shown that such a right can only exist in Mississippi by virtue of a contract lien, duly recorded in the "contract lien book," in the circuit clerk's office, and no such contract has been produced by them. Having no lien for supplies on the cotton in Mississippi, the intervenors did not certainly acquire one after it came into this State.

Delop & Co. v. Windsor & Randolph—S. H. Kennedy & Co., Interveners, 185.

MORTGAGE—Continued.

3. A chattel mortgage is unknown to our law. It can not be enforced in this State, where movables are not susceptible of being mortgaged. This court is not bound by the comity of nations to enforce a contract, which, if made here, could not defeat the rights acquired by attachment under our own laws.

The position taken by the intervenors that they are the owners of the cotton and therefore entitled to its proceeds, contradicts their judicial admissions in their petition of intervention, and therefore can not be permitted. *Ibid.*

4. The main question in this case is, whether a plantation having been sold at the suit of the first mortgagee, the rights of subsequent mortgagees are transferred by the sale to the proceeds—said mortgages no longer subsisting. The decision of the controversy depends on the interpretation to be given to a clause in the *concordat* between certain debtors and their mortgage creditors of superior and inferior rank.

This court thinks that said clause, which is recited at full length in the judgment, did not bind Mrs. Crozat, one of the first class creditors, in case of her foreclosing her mortgage, to cause the property to be sold at one, two and three years, for the reason that her mortgage was not novated, that her note was not identified with the *concordat*, and that she could not proceed under it to enforce her mortgage rights. Her purpose, in becoming a party to the *concordat*, was simply to give certain debtors an opportunity to pay their debts to their creditors by suspending the enforcement of her mortgage to a given time, provided the interest on her claim was punctually paid. The failure to pay this interest, which was made the express condition of her agreement to the delay, released her from the obligation of said contract, and restored her to her full rights under her own act of mortgage.

Mrs. Crozat did not expressly consent in the *concordat*, to enforce her first mortgage under the stipulations of that second act, and it is not to be presumed that she gave up more of her rights than were clearly and distinctively waived or relinquished. This act is to be construed liberally in her favor, as no one is presumed to give. She had therefore the right to seize and sell as she did. The sale and adjudication to the plaintiff having been legally made, and the price absorbed by the first and second mortgages, those created in favor of the third mortgagees are properly canceled, and the plaintiff can not be disturbed in the rights he has acquired.

F. B. Fleitas v. Consolidated Association of the Planters of Louisiana et als., 223.

5. Article 2446 of the Revised Civil Code provides that a contract of

MORTGAGE—Continued.

sale between husband and wife can take place only in the three cases which it mentions.

In this instance, the husband and wife had no right to contract in the manner attempted, and the mortgage sought to be enforced by executory process is utterly void.

The defendant erroneously contends that, as a third holder before the mortgage paper, resulting from this illegal contract, became due, he is not affected by said nullity.

The act of mortgage with which the notes were identified by the official paraph of the notary, showed on its face that the instrument was a contract between husband and wife, made in contravention of law. The defendant, therefore, took the notes, presumably with a knowledge of the incapacity of the parties to make the contract. Besides, a mortgage is not commercial paper governed by the rule invoked by defendant.

F. S. Garner, Administrator v. Watson M. Gay and Sheriff, 375.

In 1835, the marriage contract between Mrs. Elizabeth Martin and John Dawson, which, it is claimed, contains a "*constitution of dowry*," was recorded in the book of donations in the office of the recorder of mortgages in New Orleans, and it is contended that this preserved the registry of the wife's mortgage on the property of her husband, and gives her the preference to the proceeds of his property over the other plaintiffs and contestants before this court.

Article 1541, Code of 1825, is invoked. It provides that: "When the donation comprehends property that may be legally mortgaged, the act of donation, as well as the act of acceptance, whether the acceptance be made by the same or a separate act, must be registered within the time prescribed for the registry of mortgages, on a separate book for that purpose, by the register of mortgages, which book shall be open to the inspection of all parties requiring it."

The object of this article is not to give notice of the wife's mortgage upon her husband's property for the protection of her dotal or other rights, but to operate as notice of the property donated, its status, and the inability of the donor, probably, or his creditors, to in any manner affect said property. It relates only to the property embraced in the act of donation, its title and character.

The wife's mortgage, as to her husband's property, existed without the registry, but when the system of this class of mortgages was changed, registry became necessary, and some of the modes prescribed for the registry of the various kinds of mortgages was essential. The registry of the marriage contract, in this instance,

MORTGAGE—Continued.

not being one of the modes prescribed, is not a compliance with the law on the subject. It did not operate or preserve a mortgage before the first of January, 1870, and there is no law giving it such effect since that date.

Because the function of the mortgage office and its records is to preserve mortgages, it does not follow that the direction to record an act of donation in a book of donations (conceding the marriage contract in this instance to be a donation), created and preserved a mortgage in favor of the donee—the wife. Mortgages, to be preserved and effective, as to third parties, must be registered in the book and in the manner prescribed by the law for that purpose. This was not done in this case.

Succession of E. Cordevielle v. John Dawson. Maria Louise Remy v. The same. Mrs. Elizabeth Martin v. The same. Consolidated, 534.

7. This suit is brought on a judgment in which the original obligation was merged. In the authentic act by which the defendant acquired from Byrne, Vance & Co., his title to the real estate subject to the plaintiff's judicial mortgage, the defendant bound himself expressly to pay whatever amount Mithoff, the plaintiff, might recover against Byrne, Vance & Co., in a suit then pending and not finally determined. Thus, it was a condition of the sale to Bohn, that he should pay whatever judgment, if any, Mithoff should obtain in the court of last resort. The amount of such judgment, if finally obtained against Byrne, Vance & Co., was to constitute part of the consideration to be given for the property by Bohn.

The court is not able to see what interest or right the defendant can have in protracting this litigation on the pretense that confederate money was the basis of the contract originally entered into between Mithoff and Byrne, Vance & Co., and which culminated in a judgment.

William Mithoff v. Auguste Bohn, 566.

8. The court below did not err in refusing the intervenor the preference which she asserts, because her legal mortgage was not duly recorded in the mortgage office prior to the first of January, 1870. It was recorded in December, 1869, in the book of donations only. The fact that in the month of March, 1871, the book of donations was closed, and the same book was used thereafter as a mortgage book, can not benefit the intervenor, whose mortgage had already perished for want of registry in the mortgage book.
- That the plaintiffs had knowledge of the intervenor's tacit mortgage is of no consequence. Under numerous decisions of this court knowledge is not equivalent to registry.

MORTGAGE—Continued.

Article 123 of the State constitution does not impair the obligations of contract, and is not violative of the constitution of the United States.

E. Rochereau & Co., in liquidation, v. D. H. Delacroix—On third opposition of Mrs. Stephanie de Livaudais, wife of D. H. Delacroix, 584.

9. The plaintiff having a legal mortgage on a certain piece of land at the time of its being given to her by her husband, in payment of a valid debt which he owed to her, took said land free from defendant's mortgage, which was junior to her's, and which she could have disregarded in enforcing her rights, by the sale of said property, without giving good cause of complaint to said junior mortgagee.

Marie Elodie Perret, wife, etc. v. Bernard Sanarens and Sheriff, 593.

10. On the nineteenth of June, 1873, P. S. Wiltz obtained from the district court in St. Landry an order of seizure and sale against a certain piece of property. On the twenty-first, notice thereof was served on the plaintiff, administratrix of the estate of the deceased owner of the mortgaged property, and the seizure was made on the twenty-fourth of the same month, a keeper was put in possession and notice of the seizure served on the plaintiff and administratrix. The property was subsequently sold and adjudicated to P. S. Wiltz & Co. on the sixth September, 1873.

On the twenty-fourth of June, 1873, the probate court of St. Landry homologated the deliberations of a meeting of the creditors of the deceased convoked on the petition of the administratrix, and held on the twentieth of June, 1873. The judgment of homologation ordered the sale of all the property of the estate, including that in dispute here, and which was then actually in the jurisdiction of the district court. Under this order the said property was adjudicated to the plaintiff and administratrix on the thirty-first of July, 1873;

Held—That the mortgage creditor had the right to go into the district court to have the mortgaged property sold. That court having been seized of jurisdiction of the property, the order of the probate court was ineffectual to divest that jurisdiction, and the sale thereunder to the defendants and appellants was not the sale of the property of another, as contended by the plaintiff and appellee. On the contrary, the sale under the order of probate conveyed no title.

Julie Guilbeau, widow, etc. v. Pierre S. Wiltz et als., 600.

11. As a general rule the sale of property by the probate court trans-

MORTGAGE—Continued.

fers the mortgage from the thing sold to the proceeds in the hands of the administrator, but this applies only to the sale of the property of the deceased. In the case at bar, at least one-half of the mortgaged property belonged to the defendant, the surviving husband, and the value of this half exceeds the amount of the mortgage of the third opponent. The sale of defendant's property by the probate court certainly did not raise the mortgage of the third opponent thereon.

W. W. Harper v. H. Linman—Neith Lodge, Third Opponent, 690.

SEE PROMISSORY NOTES, No. 21—*Brooks v. Mrs. Stewart and Husband, 714.*

SEE LAWS AND STATUTES, No. 22—*Micou et al. v. Benjamin and Day, 718.*

SEE HOMESTEAD, No. 1—*Fugua v. Chaffe & Bro., 148.*

SEE SEIZURES AND SALES, 6, 7—*Chaffraix & Agar v. Packard et als., 172.*

SEE SEIZURES AND SALES, No. 11—*Riley v. Oondran, 294.*

SEE SEIZURES AND SALES, No. 14—*O'Hara v. Folwell, 370.*

SEE BONDS, No. 10, 11—*Olements v. Biossat et als., 243.*

SEE BONDS, No. 15—*Parker v. Bernard, 275.*

SEE HUSBAND AND WIFE, No. 13—*Louisa Reich v. Rosselin et als., 418.*

SEE INTERVENOR, No. 6—*Webb v. Keller, 596.*

NEGOTIORUM GESTOR.

SEE ADMINISTRATOR, No. 19—*Rents et als. v. Cole, 623.*

NEW ORLEANS.

1. According to the twenty-fourth section of the present charter of the city of New Orleans, when one-fourth of the front proprietors petition for the banquetting of the sidewalks, if a majority of the front proprietors along said streets fail to object to the request of the said petitioners by a written petition addressed to the Council, they are presumed to have assented to the demand of the petition, and they should be bound by a contract entered into in accordance with said petition, to make the banquettes which they were legally bound to make.

The evidence showing that the work was well done and that the price charged was reasonable, it would be repugnant to every principle of law and equity to permit the plaintiffs to enrich themselves at the expense of others.

The law, when it speaks of one-fourth of the proprietors upon whose petition the City Council is to act, refers to the owners of property fronting on the portion of the street to be paved, and in whose front the banquetting is to be made.

NEW ORLEANS—Continued.

The constitutional objection to the twenty-fourth section of the city charter, on the alleged ground that it imposes a tax which is not equal and uniform, is not well taken. The court does not understand that any tax is imposed by said section, in the technical sense of the word. It merely requires each proprietor to pay for his banquettes, and authorizes them to indicate when the banquettes shall be made and the character thereof; and, in doing this, the Legislature does not violate any provision of the constitution.

Hermann Daniel et als. v. City of New Orleans, Page & Co. et als., 1.

2. The purport of all the regulations made in relation to the matter of drainage into the Carondelet Canal and the Bayou St. John, from the act of the Legislature of March 10, 1858, appears to be, that the city was prohibited from such drainage; or, if persisted in, that it should indemnify parties injured thereby—such indemnity to be ascertained by experts as damages. A report of such experts fixed the sum of \$500 per month in favor of the relator after the first of July, 1869, *so long as such drainage should continue*. The decision of this Court rendered in March, 1871, while the city was still draining into the Bayou St. John, limited the liability of the city to pay \$500 per month to the relator, for this draining privilege, to the end of his lease, which expires in April, 1878.

But that decree certainly did not bind the city to continue to drain into the Bayou St. John until the expiration of the relator's lease, whether it thought proper to do so or not. It was not bound to pay for a privilege after ceasing to use it and after having abandoned it in March or April, 1873, paying the relator up to that time.

The swamp back of the city is a natural reservoir which, in its turn, sends all its waters into the lake beyond, and if from natural causes any of those waters on their way to the lake are thrown back, so that through certain outlets connected with the bayou, which the plaintiff himself can readily close, a portion of the swamp water, freed from smell and noxious matters, for a limited period of time finds its way into the bayou, that state of things can not be called drainage by the city into the bayou.

State ex rel. Louis Gagnet v. Administrator of Public Accounts, 336.

3. The permission to erect a platform scales with a covering at the coal landing in the Second District, city of New Orleans, was granted to the plaintiffs by resolution of the City Council on the eighteenth of June, 1872, provided "that this permission be revokable at the pleasure of the council." The plaintiffs pray for an injunction to prevent the city from removing the platform and covering erected over it, and also sue for damages. After the trial in the court below, and after an appeal had been taken and the

OBLIGATIONS AND LIABILITIES—Continued.

liability of defendants. But it happens that the plaintiff paid out its money on the faith of the deposit of the forged checks, at least one hour and a half before the defendants gave the certification, or even had knowledge of the existence of the forged checks. The loss therefore was not the consequence of the certificate.

The plaintiff, holder of the forged checks, was promptly notified of the forging, as soon as discovered, and within six hours after the certification. Whether or not the plaintiff would have succeeded in capturing Clayton, Williams & Co., the forgers, and would have recovered the money, if the defendants had detected the forgery as soon as the checks were presented for certification, is not established with sufficient certainty to enable the plaintiff to recover, assuming that to be a good ground for recovering judgment, of which no opinion is expressed.

Louisiana State Bank v. Hibernia Bank and Germania National Bank, 399.

3. The defendant removed to the city of New Orleans a certain saw mill, engine and other fixtures, from mortgaged premises on which they stood. For which removal he is sued in damages by the plaintiff, who claims that he holds on the tract of land to which they were attached a vendor's privilege and special mortgage. The removal was effected under the written authority of one of the owners of the property. Some time afterwards, said sawmill, engine and fixtures were purchased by the defendant, who had removed them in the manner above stated.

At the time of the sale to defendant, said objects were movable property and in no way affected by the mortgage.

The fact that the defendant was employed by the owner to remove the property, created no legal obligation against him in favor of the mortgage creditor, nor did his purchase of it subsequently have that effect.

M. H. Meyer v. A. Frederick, 537.

4. At a public sale made for the purpose of partition, the plaintiff, a possessor in bad faith, became the adjudicatee of two tracts, including the very land which he had possessed during twenty years, and which he had highly improved by clearing and otherwise.

Although the plaintiff has not been actually dispossessed, yet, as a question of law, such has been the effect of the sale and adjudication. In matter of eviction it is a well settled doctrine that actual dispossession is not always required. A purchaser may be evicted, although he continues in possession of the property, if that possession be under a different title, as for instance, if the vendee should subsequently hold under the true owner.

OBLIGATIONS AND LIABILITIES—Continued.

The same principle may be laid down with regard to the possessor in good or bad faith, whose works and constructions have been kept by the owner of the soil. Whether the latter appropriates them to his own individual use, or alienates them to the person to whom he owes the reimbursement, or to any one else, the case is the same. In the first and third hypothesis he retains or transfers that which is but conditionally his property; and, in the second, he transfers to the owner his own property; in the latter, the obligation to reimburse or refund can not be doubted.

The obligation of the defendants in this case is to pay the value of the materials and the price of the workmanship, without regard to the increase or decrease in the value of the soil. As the buildings were the plaintiff's property, the defendants' claim for their rent is unfounded.

The defendants' other claim for the rent of the land is also unfounded. The case is not one of letting and hiring. The claim is one in the nature of damages for the wrongful detention of property, and although the trespasser is not allowed to prefer a claim for the enhanced value of the soil, attributable to his improvements, yet in the admeasurement of damages, to which he is subject, the benefit derived from such improvements becomes an important element.

The defendants, Wright, Williams & Co., contend that, previously to the partition sale, they had parted with their interest in these lands. The answer to this is, that the partition suit was carried in their own name and for their individual benefit.

Milton Wilson v. J. P. Benjamin, et als, 587.

5. The presumption is that every one, capable of contracting, knows what an obligation is which he signs, and he cannot be relieved from the effects of his act by showing that he does not understand the language in which the obligation is written.

Vincent Boagni v. Victor Fouchy, 594.

6. The ruling in this case of the court *a qua*, permitting the introduction of parol proof that one McMichael never owned the property in dispute, and that Spiller did, was clearly wrong.

McMichael having sold the property in dispute to French, and received one thousand dollars cash in consideration for it, executed his bond for title, and French, taking possession of it, expended eight hundred dollars in repairs. There was no obligation resting upon McMichael further than to execute a deed when called upon. The property belonged to French to all intents and purposes, and whether McMichael objected or not to the subsequent probate sale of the property, as part of the estate of one Nancy Spiller, did

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OBLIGATIONS AND LIABILITIES—Continued.

not in any manner affect the rights of French. Norris bought the property as belonging to said estate, and Bach bought it from Norris. After these transactions, French sued McMichael on his title bond, and cited both Bach and Norris as parties;

Held—That Bach had made himself liable, under the circumstances of the case, for the value of the rent of the property from the date of the service of the citation upon him in the suit of French against McMichael.

Mrs. Louisa French, Executrix v. John M. Bach et al., 371.

7. Michel, one of the defendants, in paying to Marchand, the holder of his negotiable note acquired before maturity, did, voluntarily, only what Marchand could have compelled him to do; and the plaintiff, who was defrauded of said note by his brokers, has no right to demand from him payment a second time. His recourse is against his unfaithful agents.

When one of two innocent persons must suffer, he whose act contributed to the loss must suffer rather than the other, who only discharged a legal obligation.

Jules A. Florat, Tutor, v. Alfred Marchand and M. F. Michel in solido, 741.

8. The defendants, merchants in New Orleans, were instructed to sell cotton and send the money to care of W. W. Robertson, Glencoe, Mississippi, by the steamer Belle Lee. Defendants put the money in a package directed as advised, and sent it by one of their clerks to be put on board the Belle Lee, then at the wharf in New Orleans, and about to leave port. Within a short distance of the boat the clerk was knocked down, and robbed, while in an insensible condition, of the money and his gold watch. No recovery was ever made of the money;

Held—That, under the circumstances of the case, the defendants should sustain the loss, because the money was in their custody and under their control when the robbery occurred. It was out of the plaintiffs power to prevent the act of the robber.

Parker & Co., for the use of, etc. v. J. P. Harrison, Son & Co., 751.

9. Where plaintiffs alleged that the first adjudication of a certain market vested in them the title to collect the revenues of said market, and that when, in defiance of this adjudication, the controller of the city of New Orleans sold it anew, and received \$2500 more than their bid, this sum of \$2500 belonged to them;

Held—That by the terms of the sale, the city authorities had reserved the right to reject any or all bids. The second adjudication was a rejection of the first bid, and as this second adjudication was

OBLIGATIONS AND LIABILITIES—Continued.

ratified by the council, it follows that the plaintiffs' claim for the difference between the first and second adjudications can not be maintained.

Batt & Michel v. The City of New Orleans et al., 754.

SEE BILLS AND PROMISSORY NOTES, No. 25—*Commercial Press v. Crescent City National Bank*, 744.

SEE BONDS, No. 4—*Edward Conery v. Cannon et al.*, 123.

SEE INSURANCE, No. 3—*Hardee v. St. Louis Mutual Insurance Company*, 242.

SEE SHERIFF, No. 2—*Gay v. Lejeune et als.*, 250.

SEE INSURANCE, No. 12—*Carroll & Co. v. Jackson Railroad Company*, 447.

OFFICE AND OFFICERS.

1. This case is not one in which the district attorney, acting as parish attorney, can claim under section 2761 R. S., "a fee of five per cent. on the amount, for defending" the said suit, as no amount was claimed or actually involved therein.

It is manifest that the above mentioned section contemplates some services to be rendered for which the salary—the minimum of which is fixed—should be a compensation, and it provides only for commissions when there is a suit by or against the parish for an amount on which the commissions can be assessed.

Josiah Fisk v. Police Jury, Parish of Jefferson, Left Bank, 20.

2. The city of New Orleans, like any other plaintiff, has the right to control its own judgments and *fieri facias*, and had the right to cause those issued in these cases to be set aside, but by so doing, it could not deprive the clerk, who had properly performed his duties, of his legitimate costs.

The objection made to his being paid, because, instead of turning over the *fieri facias* to the city attorney, as directed, he gave them to the sheriff, is not well founded.

The clerk, at the time was surrounded by a hostile body of men and driven by force out of the office to which he was by law entitled; under these circumstances, the court does not consider that, because the *fieri facias* were sent to the sheriff's office at such a moment of tumult, for safe keeping, the clerk deprived himself of the right to claim the legal price of his work.

Thomas Lynne v. City of New Orleans, and E. T. Manning v. the same. (Consolidated), 48.

3. Where it was contended that, in a former proceeding before this court, while acting as clerk, of the Eighth District Court, Manning was punished in this court for a contempt of its authority, and therefore that he had been recognized as clerk of said Eighth

OFFICE AND OFFICERS—Continued.

District Court, from which it follows that, having been recognized then, he must be recognized now ;

Held—That this court takes cases as they are found and decides them upon the pleadings by which they are presented. In the proceeding referred to, Manning's right to office was not contested; in this case it is expressly put at issue. This court is therefore forced to declare whether he was, or not, entitled to the office when he took possession of it, and when the services for which he claims payment were made. *Ibid.*

4. The Attorney General has the right to designate an attorney at law to assist the attorney for the State, or to prosecute alone in certain cases. *State of Louisiana v. G. Russell*, 68.
5. The instrument objected to is a certified transcript of the tax collector's account in the Auditor's books and not a certificate merely of facts.

It was the duty of the Auditor, a sworn officer of the State, to keep an account with the said tax collector and charge the latter with items of defalcation, and he is authorized by law to give certificates of the contents of such books and of the records of his office under his official seal.

Citizens' Bank of Louisiana v. Clarence L. James, 268.

6. This is a contest for office. The appeal should have been made returnable within ten days after the judgment. The appeal granted by the District Court was incorrectly made returnable on the second Monday of February, and when the error was discovered the appellant had a proper return day fixed according to law. The motion to dismiss the appeal can not prevail.

Plaintiff, alleging to be the sheriff for the parish of Madison, enjoined defendant from acting or assuming to act as sheriff, from possessing or attempting to possess the books, papers, and archives of the said office, and from intruding or attempting to intrude himself therein. The defendant excepted to the form of action, averring that it should have been brought under the intrusion act and in the name of the State and the proper law officer of the State. The exception is well taken and should have been maintained. The injunction must be dissolved.

Enos M. Cramer v. Alexander V. Brown, 272.

7. The peremptory exception to the right of the relator to maintain this action on the ground that the intrusion act under which this suit is brought is repealed by the special act of 1873, entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office," approved March 5, 1873, is not well taken.

OFFICE AND OFFICERS—Continued.

There is no conflict between the essential provisions of the two acts; the only points of difference are that the later act is of a less general application and the proceedings under it of a more summary character. According to the return of both Returning Boards for the election held in November, 1872, the defendant was defeated. It is clear that the defense is without merit.

State ex rel. P. P. Carroll v. Philogene Jorda, 374.

8. The authority of the Governor to remove a tax collector and appoint a successor, has been expressly recognized by this court in the cases of Dougherty and of Dayrus, 25 An. No reasons can be seen for reversing these decisions.

State of Louisiana ex rel. D. A. Weber v. C. L. Fisher, 537.

9. The relator, in this case, was duly elected or appointed to the office he claims on the second of December, 1872, in the only manner then known to the law. The act of the Legislature of March 9, 1874, changing the mode of appointment, can not be construed so as to make it retroactive. It must be understood to apply to parishes where appointments to that office had not been made by the police juries, or where vacancies existed.

In this instance the office of district attorney *pro tempore* had been filled, and the incumbent's term of office had not expired. The act of March 9, 1874, does not abolish the office of district attorney *pro tempore*, but only alters the mode of appointing to that office.

State ex rel. L. B. Claiborne v. Charles Parlange, 548.

10. The absence of the Governor from the State for a few hours, or a few days, creates no vacancy in the office, and does not authorize the assumption of the duties, prerogatives and emoluments thereof by the Lieutenant Governor during said absence. It must be, under a proper construction of article 53 of the constitution, such an inability to discharge the duties of the office, as well as such absence from the State as would affect injuriously the public interest.

It is manifest that the absence of the Governor from the State is to be ascertained on some proof accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as Governor of the State. There being no provision of law for the mode in which the Governor is to manifest to the public his absence from the State, it is necessarily left to his discretion, subject to his responsibility to the people.

This court does not think that it was ever contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor or Speaker of the House of Representatives should slip into his seat the moment he stepped across the borders of the State.

State of Louisiana ex rel. H. O. Warmoth v. James Graham, Auditor, 563.

OFFICE AND OFFICERS—Continued.

11. In this suit under the intrusion into office act, the clear explicit language of the twelfth section of the act of the Legislature of the twenty-first of March, 1874, declaring that the mayor of the town of Homer shall receive a salary of five hundred dollars a year, with no other fees or emoluments of office, and the other portion of said statute authorizing the mayor to act as justice of the peace, can not, under the allegation that as justice of the peace, he is entitled to fees, be so construed as to give jurisdiction of the case to the district court.

State ex rel. L. A. Cormick v. S. R. Richardson, 631.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676.

SEE LAWS AND STATUTES, No. 2—*Master and Wardens of the Port of New Orleans v. R. W. Foster*, 105.

SEE MANDAMUS, No. 4, 5—*State of Louisiana ex rel. Merle v. Dubuclet*, 127.

SEE TAXES AND TAX COLLECTORS, Nos. 7, 8, 9—*Simmons and Leroy v. Boult*, 277.

SEE SHERIFF, No. 5—*Adams v. Dinkgrave*, 626.

PARTNERSHIP.

SEE SUCCESSION, No. 2—*Netter v. Herman & Lery*, 458.

SEE ACTION, No. 12—*Mangrum v. Norsworthy*, 640.

PARTITION.

1. The objection that the partition among certain heirs is void, on ground that it was not evidenced by a written act, is unsound, when they went into possession and were permitted to prove by by parol the division or partition.

If it be granted that a partition is virtually a sale of each heir to the others, of his share in indivision for the sole ownership of the particular part assigned to him, still, like a sale, it can be proved by parol evidence, if it is received, as in this case, without objection.

John W. Johnston v. Gustavus and Hypolite Labat, 159.

2. The partition of succession property, real and personal, can be considered a no more solemn act than the transfer of real property, which may be proved by propounding interrogatories, as was done in this case. Therefore the exception to the interrogatories was not well taken, on the ground that no act of partition can be proven under the law, except by a written act of partition signed and executed by the parties thereto.

A. L. Gusman et als. v. Mrs. Zulme E. Hearsey and Husband, 251.

3. The motion to strike out certain specified portions of defendant's answers, as being irrelevant and contradictory, can not be maintained. The object of the interrogatories was to prove a partition

PARTITION—Continued.

by the mutual consent of all the heirs, and to establish the consent of the respondent thereto. She certainly had the right to state all the conditions and stipulations of the alleged agreement and the facts upon which her refusal to complete it was based. Such matters are closely linked to the facts on which she was interrogated, and they related to the very gist of the controversy. They are not irrelevant, nor are they contradictory, when taken all together. *Ibid.*

4. The defendant objected to the introduction of her answers until the plaintiffs had first shown that actual delivery of the property was made under the alleged partition. The answers were properly received. It is a rule of practice under our jurisprudence not to control a party in the order of introducing his proofs. *Ibid.*
5. The defendant's objection to any parol evidence to contradict her answers to interrogatories on facts and articles is well taken. The plaintiffs' action is based on the theory that the partition is a transfer or exchange of real estate, and it is well settled that the answers of a party to interrogatories propounded to prove such transfer or exchange, can not be disproved or contradicted by parol. *Ibid.*
6. The same objection was properly taken to the parol evidence to prove a partition "of the movable property mentioned in each lot." The partition of a succession is the division of the effects of which the succession is composed, among all the co-heirs, according to their respective rights. In this case the succession was composed of real and personal property and rights, and the partition was intended to be of such property and rights as a whole or mass, and the evidence should be that which is necessary in relation to real property.

The proof of the delivery of real property is not confined to written or documentary evidence. *Ibid.*

7. Nothing prevents the owners of property in common from exercising their rights of partition, and it is not seen how the proceedings complained of in this case by plaintiff can injure her right of mortgage on the property which the owners have taken measures to partition, as her judicial mortgage will follow the property or its proceeds.

Mrs. Elise Labauve v. Mrs. Emily Woolfolk et al., 440.

8. In this case, two lots with buildings thereon were owned and held in common by two different persons, and, at the partition, nothing being said as to the dividing line, the parties (one of whom a minor whose tutor the plaintiff is) must have considered the limits to be

PARTITION—Continued.

defined by the buildings on each, which constituted a double cottage, and this state of things continued, without complaint, for about three years thereafter, when the plaintiff assumed to establish a line for himself without notice to his neighbor aforesaid, by tearing down a portion of the buildings which he alleged to extend over the minor's lot some nine feet, and took an injunction to prevent defendant's interference. The evidence does not sustain the injunction, and defendant claims damages. It is not thought, however, that the minor should be responsible for the illegal acts of his tutor. In such capacity he could have protected and exercised the rights of the minor in a legal manner. As the plaintiff is not before this court individually, all that can be done is to dissolve the injunction, reserving defendant's rights.

P. Lyons, Tutor v. J. O. Dobbins, 580.

SEE EVIDENCE, No. 36—*Fleming & Baldwin v. Scott and Ida Watson*, 545.

PAYMENT.

1. Whether Hatch, the United States collector of customs at the port of New Orleans, continued after secession to act in the same capacity as before, or whether he became collector of customs for the Confederate States, it is not important to decide in this case, as in either event the payment of duties to him should protect from seizure the property on which the duties were paid.

If Hatch had ceased to represent the Government of the United States and represented the Confederate States, the payment should protect the property, as it was made to the representative of a power which had the ability to enforce its demands, and which the United States, for the time being, were unable to resist.

Samuel Snodgrass v. Thomas A. Adams, 235.

2. The plaintiff claims the value of a carriage and harness he purchased from defendants and left with them on storage. He had paid a portion of the price in cash, and for the balance gave the defendants a note of J. B. Hood to the order of and indorsed by plaintiff, which was taken as a payment of the bill for the carriage, and a receipt in full given. The note was paid at maturity, but the defendants do not seem to have taken the steps necessary to bind the plaintiff as indorser. But, in any view of their rights they had no authority to sell the plaintiff's property which was stored with them subject to his order.

James Longstreet v. R. Marsh Denman & Co., 381.

SEE TRANSFER OF PROPERTY, No. 1—*De Greck & Co. v. Murphy et als.*, 296.

PLEADINGS.

1. Plaintiff, after having accepted the benefit and status conferred upon him by Pierre Monette in the act of marriage which legitimated him, can not attack the act creating his own status, and under which he is asserting his rights, by questioning the validity of the same rights conferred upon one who is recognized as his brother and also legitimated by the same document. The very words which establish the legitimacy of plaintiff, establish also the status of the defendant. He can not accept the benefits of an act and repudiate its obligations.

Succession of Pierre Monette, 26.

2. The demand set up by the defendants in this case is, in its nature, independent from the action brought by the plaintiffs, and should therefore be considered as a principal, and not a reconventional demand.

J. C. Murphy & Co. v. McCarthy & Finnerty, 38.

3. The defendants in injunction took a bill of exceptions to the permission granted by the court *a qua* for an amended petition to be filed by the plaintiff on the ground that the suit being an injunction one, all the matters of law or fact that can justify the issuing of such process could and should only be alleged and pleaded in the original petition.

The ruling of the court was correct. The amended petition contained only the plea of prescription which may be pleaded at any stage of the proceedings.

O. K. Hawley, Public Administrator and his successor J. M. Wells v. Crescent City Bank et als., 230.

4. The plaintiff having alleged that he was the owner of the boat for injury to which he claims damages, it was not competent for him to prove that he was not the owner, but only the charterer, and interested in another and very different capacity from that of owner.

William Drew v. Attakapas Mail Transportation Company and Tupper, 306.

5. It is idle for the defendant to set up that the title of the property claimed of him is in Jacob Whetstone individually. who brought this suit as administrator, and not in the successions whose representatives are before the court, and therefore that, if he pays over the money under the judgment appealed from, he may be held liable to Whetstone hereafter. Jacob Whetstone and the other parties acting jointly with him when they consigned to defendant the cotton whose proceeds are now claimed, are bound by their judicial admissions that the money belongs to said successions. The defendant, therefore, runs no such risk as he anticipates.

PLEADINGS—Continued.

The plea of prescription of three and five years is not well founded.

The action does not arise *ex delicto*, but from a *quasi* contract.

Under the settled jurisprudence of this court, no damages can be allowed where the appellee joins in the appeal, however frivolous it may be.

Jacob Whetstone, Administrator v. S. W. Rawlins, 474.

6. The exception to the petition on various grounds having been pleaded after default had been entered, was correctly dismissed by the judge *a quo*. *George Wood v. Charles Harispe*, 511.

7. The plea that the suit is premature should have been filed in *limine litis*. It was too late after answer filed.

Cooley & Phillips v. P. Esteban et als., 515.

8. Where the suit is brought to recover from defendants the amount of five notes given by them in payment of the lease of certain property and where, when the suit was instituted, there was already an action pending in another court, between these defendants and plaintiffs, to annul said lease and cancel said notes, the plea of *lis pendens* is a good one and should have been maintained.

A. Rochereau & Co., Agents v. Mrs. Bertha Lewis and Husband, 581.

9. The objection set up in a motion in arrest of judgment, that Charles W. DuRoy, who filed the information as district attorney *pro tempore*, was not appointed to that office and consequently that his official act was a nullity, came too late. If the exception is a good one, it should have been pleaded before going into the trial. Besides, in a motion in arrest of judgment, only errors fatal on the face of the record can be examined.

State of Louisiana v. Aladin Nunes, 605.

10. Where the dative testamentary executor contended that none of the issues raised in a supplemental petition of opposition of the ninth August, 1873, to his tableau and final settlement, could be entertained by the court, because before that, to wit: on the fourth of August there was judgment homologating all the items not opposed:

Held—That as the original petition opposed in general terms the homologation of all the items of the account, except the law charges and costs, it follows that only these items were homologated by the judgment of the fourth of August, 1873. The supplemental petition of the ninth of August supplies, so far as the items therein specified, the deficiency complained of in the original petition of opposition. It cures to that extent the objection of vagueness. The court *a qua* erred therefore in dismissing the opposition.

Succession of Pierre Cabrol. Opposition of Marie Nezot, 609.

PLEADINGS—Continued.

11. The defendants are sued as sureties, bound *in solido* which they deny. After the case had been tried and submitted, but before judgment, the defendants offered to file the plea of division. This was objected to on the grounds that it came too late, and that many of the co-sureties were then insolvent. The plea was properly refused by the judge *a quo*.

Division is a right accorded to sureties, but they can not claim this benefit while denying their obligation as surety; the plea is inconsistent. The obligation sued upon in this instance is manifestly one of suretyship, and solidarity is of the nature of that contract. *Thomas B. Kilgore v. John L. Tippit et als.*, 624.

12. The defendant is bound by the pleadings he filed through his counsel. Without disavowing the authority of the pleadings, he can not come into court, two years after he has raised the issue of payment, which admits the debt, and shift his defense by setting up an inconsistent plea—a denial of the indebtedness.

A litigant will not be permitted to shift his position in order to escape the consequences of his solemn judicial admissions standing on the record for nearly two years.

A. L. Gervin v. J. H. Beaird, 630.

13. Where, in defense of the action, it was alledged by the advocate appointed to represent the debtor who absconded, that the property attached, although in the name of the defendant, was in reality the property of a commercial firm of which defendant was a member, and that partnership property could not be attached:

Held—That it would be time enough to pass upon this defense, when made by some one having an interest to make it, to wit: one of the partners, or a creditor of the firm, if there be a partnership.

Andrew J. Williams, v. E. F. Williams, 644.

14. The plea of payment and that of novation are inconsistent. A debt paid can not be novated. There is nothing to novate.

Hoss & Elder, Administrators, v. George J. Jones, 659.

15. The argument, on behalf of the sureties, that they can not be condemned to pay, because the recorder did not obtain their written consent to the appointment of the deputy, as provided by law, can not avail one of the securities who is himself the deputy. As to the other the matter should have been specially pleaded. It is raised for the first time, in this court, under the general issue.

J. H. Brigham, Curator v. A. L. Bussey et al., 676.

16. The plea of *lis pendens* is not well founded. The plaintiff is not shown to have acquired the note from the payee after maturity, and therefore the equities pleaded are not available. The account or indebtedness of the payee to the maker of the note in a suit

PLEADINGS—Continued.

pending on appeal, can not compensate the note held by the plaintiff, even though she acquired it after due.

Mary Woods v. J. Viosca, Jr. and Joaquim Viosca, 716.

SEE EVIDENCE, Nos. 16, 17, 18—*Boedicker v. John East et als.*, 209.

SEE CONTRACT, No. 4—*Citizens' Bank of Louisiana v. James*, 264.

POLICE JURIES.

1. The work, for which payment is claimed in this case, was adjudicated by one of the inspectors of roads and levees in the parish of Pointe Coupee; but it is not shown that the police jury ever authorized the work, and that they provided funds necessary to pay for the same in the ordinance creating the debt. This objection is fatal.

E. K. Branch v. Police Jury, parish of Pointe Coupee, 150.

2. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector v. Charles McVea, 151.

3. The ordinance of the police jury of the parish of Concordia, which provides for the levying of a special tax to be known as a contingent tax, to be appropriated to the payment of all warrants drawn on the same for the payment of attorney's fees—any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same, is violative of the 2745th section of the Revised Statutes.

In so much as concerns the payment of attorney's contingent fees, it will be time to levy and collect a tax to pay the same when the contingency which may make them due, shall have arrived. The contingency may never happen, and there would then have been no necessity for collecting the tax.

Nathan Lorie v. Bennett Hitchcock, Tax Collector, et al., 154.

4. The police jury of the parish of Rapides is a political corporation of limited powers. Under authority to clear the banks of navigable rivers "for the purpose of securing a free passage for boats and other small river craft," R. S. sec. 2743, the police jury can not remove nor break up the woodyard of the plaintiffs, established years ago, and which in no manner interferes with the free navigation of Red river.

The police jury has authority to control the roads of the parish, Revised Statutes, sec. 3364, but the ordinance complained of does not profess to have been passed, and obviously was not passed in

POLICE JURIES—Continued.

the exercise of this power. Besides, a sufficient ground to defeat the pretensions of the police jury is that they have no authority to deprive plaintiffs of the right to pursue their occupation as keepers of a woodyard, which is not alleged to encroach on any public road.

William L. Morgan & Co. v. Police Jury of the Parish of Rapides, 281.

SEE CORPORATIONS, No. 2, 3—*Stephen C. Sterling v. Parish of West Feliciana*, 59.

SEE TAXES AND TAX COLLECTORS, Nos. 7, 8, 9—*Simmons & Leroy v. Boullt*, 277.

PRACTICE.

1. This being an injunction case originating in a suit on a promissory note, is not such as entitled parties to a trial by jury, as it does not come under the exceptions contained in the 494th article of the Code of Practice.

More than a year having elapsed from the last payment of interest to the institution of this suit, the usurious payments which were expressly imputed by the parties to the interest can not now be recovered back, nor imputed to the capital.

James McCracken, Administrator v. James Madison Wells, 31.

2. This is an injunction suit, in which the plaintiff alleges that the judgment under which execution issued is a nullity, on the ground that there is no legal corporation plaintiff therein, or owner thereof, such as the Accommodation Bank.

There is no principle better settled than that a party is not allowed to arrest an execution on grounds that he might have set up in the original suit. Here the party taking the injunction, not only might have set up in the original suit that the Accommodation Bank was not legally incorporated, but did do it. Hence it is *res judicata*.

Erancis C. McMillen v. Accommodation Bank et als., 34.

3. It has been so often decided that a defendant may release on bond the sequestration of his property that it can no longer be considered an open question.

The right to appeal from the order refusing this right is equally well settled.

State ex rel R. Taylor v. Judge of the Superior District Court, 65.

4. It is not true that the right to release on bond applies only to cases falling under article 275 C. P., and that a sequestration ordered *ex officio* by the court under article 274 can not be thus released. *Ibid.*

5. Article 279 C. P. means what it says. Its terms are general.

PRACTICE—Continued.

Except in cases of failure, any sequestration may be released on bond. Were the meaning of article 279 doubtful, a liberal construction would be given to it, because the article is remedial in its character. *Ibid.*

6. A rule was taken by plaintiff on the garnishee in this case to show cause why he should not pay a certain judgment against defendant, because he had in his possession, notwithstanding his negative answer which was alleged to be false, property, rights and money of defendant to pay said judgment, and the garnishee on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in vacation. The exception was overruled, and the garnishee filed an answer in which he prayed for a jury. The exception should have been maintained; the issues presented were such as should have been submitted, if desired, to a jury.

A. C. Denouvion v. Rebecca A. McNight—W. O. Harrison, garnishee, 74.

7. The affidavit on which the writ of provisional seizure issued in this case is insufficient. It was made by a person not shown to be one of the parties, or their attorneys, or a party to the suit.

The affidavit authorized and prescribed by the law is one made by the party or his attorney. One made by any other person is not authorized by the law, and, as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

S. Fernandez & Co. v. Elias Miller, 120.

8. An auctioneer is not the party to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily.

Myra F. Minor v. James L. Barker, Auctioneer, et als., 160.

9. A rule by the relator was taken in the court *a qua* to show cause why her opposition to the homologation of the report of certain experts should not be maintained, and an order of sale be rescinded. On trial, the opposition was dismissed, and the application to rescind the sale discharged. The judge *a quo* refused to grant an appeal. Among other reasons for it he alleged that these orders are merely interlocutory, and can not operate an irreparable injury. This is an error. The facts are such as to entitle relator to an appeal.

State ex rel. Mary B. Caldwell v. The Judge of the Fourth District Court, parish of Orleans, 161.

PRACTICE—Continued.

10. A writ of attachment can be dissolved by exception as well as by rule to show cause. This course is pointed out by the 258th article of the Code of Practice, which declares: "If the defendant, thus made a party to a suit, appear after having been served with the citation, or prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false, such attachment shall be dissolved, and the party will be allowed to proceed in his defense as in ordinary suits."

The exception in this case was in writing, and this is the notice required by law. Defendant might, under the practice which has grown up since the Code was adopted, have taken a rule to show cause, but there is no reason why he should not pursue the course pointed out by the written law, instead of that which convenience has made customary.

Charles A. M. Poutz v. Auguste Reggio, 305.

11. On the day of trial the sheriff had not made his return as to a subpoena issued for a witness on behalf of the defendant. A motion for a continuance on this ground was overruled. The case, however, was continued until the following day, when the sheriff made his return that the witness was not to be found. The application for a continuance should have been renewed after the return of the sheriff. This not having been done the court *a qua* did not err in proceeding to trial. *State of Louisiana v. Jacob Turner*, 390.

12. The judge *a quo* erred in making absolute the rule for the appointment of a receiver in this case. The petition on rule does not aver a necessity for it, nor any loss, injury or damage likely to arise to plaintiff, if it should not be done. There is no reason why the entire revenues of all the property belonging to the litigants should be taken possession of by a receiver, on the ground that the plaintiff owns one-fourth of it, when said plaintiff fails to allege even a cause for such appointment.

Mary Malady v. William Malady et al., 438.

13. When a reconventional demand has been filed, the plaintiff is bound to take notice of its trial and of all adverse defenses set up in the cause which he himself has commenced against his adversary. In this case a jury was prayed for by defendant. The case was tried without a jury. No bill of exceptions was taken by plaintiff to the trial, and no opposition to the trial without a jury was made by either party. Under such circumstances, this court will presume that a trial by jury was waived.

Fritz Huppenbauer v. Louis Durlin, 540.

14. The continuance of a cause comes within the sound legal discre-

PRACTICE—Continued.

tion of the judge, and the facts upon which he proceeds in the exercise of that discretion do not come within the review of this court.

State of Louisiana v. Sam Johnson, 543.

15. When the district court had before it sufficient authentic evidence to justify an order of seizure and sale, if there were irregularities in the advertisement of the property, they are not to be corrected in an appeal from said order.

Mrs. Emile Hoa v. Mrs. Mary Clancy, 557.

16. The form of certificate to the return of a commission to take testimony is not sacramental, and it is sufficient if it appear in the return, when and where and by what authority the deposition of the particular witness was taken.

An affidavit that the district judge was absent from the parish is sufficient under the law to authorize the parish judge to grant the order of the district judge for taking testimony.

Lambert B. Cain, Liquidator v. Solomon Loeb, 616.

17. The judge *a quo* did not err in not allowing the defendant to open and close the argument. This right belongs to the plaintiff in injunction. Neither did he err in permitting the plaintiff to call for papers necessary to make out her case, after the entry had been made on the minutes that the testimony was closed. This was a matter entirely within his discretion.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 651.

18. The judge *a quo* did not err in refusing to allow the defendant to submit her pretensions on her reconventional demand to a jury. The suit being on a promissory note and no fraud being set up as a defense, no jury was allowed by law to try the issue. Reconvention is an incidental demand. If the principal action could not be submitted to a jury, neither could that which was an incident thereto. *Margaret S. Pool v. Annie Alexander and Husband*, 669.
19. It is too late to enter a remittitur after an appeal has been granted. After the judgment was signed, it could only be corrected on appeal. *Ibid.*

20. It is well settled that the authorization of the husband any time before trial on the merits will be sufficient.

Succession of Alexander McDonald, 590.

SEE EVIDENCE, No. 31—*Higgins v. Haley*, 368.

SEE CRIMINAL LAW, No. 12—*State v. Bower*, 383.

SEE CRIMINAL LAW, Nos. 13, 14—*State v. Shonhausen*, 421.

SEE BILLS AND PROMISSORY NOTES, No. 13—*McStea & Value v. Warren & Crawford*, 453.

SEE TAXES AND TAX COLLECTORS, Nos. 12, 13—*City of New Orleans v. Rawlins*, 470.

SEE ACTION, No. 1—*J. C. Murphy & Co. v. McCarthy and Finnerty*, 38.

SEE INJUNCTION, Nos. 6, 7, 8, 9—*A. W. Walker v. E. Villavaso*, 42.

SEE BILLS OF EXCEPTIONS, No. 1—*State of Louisiana ex rel. Garthwaite et als. v. Judge of the Fourth District*, 66.

PRESCRIPTION.

1. The prescription of two years pleaded in defense of this case applies to acts of omission and commission, misfeasance, nonfeasance, etc., of the sheriff, as detailed in section 2816, Revised Statutes, and for which the sheriff and his sureties on his official bond are liable. The prescription pleaded does not apply to obligations arising *ex contractu*. The defendant and his sureties in this case were sued upon the sheriff's bond given for the collection of taxes.

State of Louisiana v. Louis Ranson, Tax Collector, and his securities, 125.

2. The evidence shows that the defendant never objected to the incorrectness of the account rendered to him until after the institution of this suit on said account. It is an account stated; *compte arrete*. The prescription of three years does not apply to such an account.

Jules A. Blanc v. S. O. Scruggs, 208.

3. The prescription of one year to this action of nullity is properly invoked. The argument of the administrator that prescription only began to run when he discovered the alleged fraud practiced upon him, can not be of any avail, as he was bound in law to know his duty as administrator, and what proceedings were had in the settlement of the succession under his care.

William L. Cushing et als. v. S. L. Harmonson et als., 214.

4. Two of the mortgage notes of the defendant, held by the bank, plaintiff in this case, were about to prescribe, when, in order to avert this loss and to recover the claim, the attorney for the bank presented the petition to the person in possession of the office of the clerk of the court and acting as such, and caused due process to issue. This was sufficient to interrupt prescription.

The clerk was a *de facto* officer and his official acts were valid, however indifferent his title to the office.

New Orleans Canal and Banking Company v. Linn Tanner, Administrator, 273.

5. It is well settled that an administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

Widow Anatole Villere v. Succession of Hughes Villere, 380.

6. The prescription of one year was pleaded in bar to the opposition made to the administrator's tableau, on the ground of usurious interest being charged on certain notes placed on said tableau. The plea should have been entertained.

Succession of Thomas F. Ostrander, 450.

7. The prescription of three years does not apply to a particular indebtedness in gold which is evidenced by a receipt and which is

PRESCRIPTION—Continued.

promised to be paid on demand, and if it came in the category of money loaned, prescription would only commence to run from demand. In the absence of proof to the contrary, the demand must be assumed to have been made only when his petition was served.

J. M. Pool v. L. Fontelieu, Public Administrator, 613

8. The instrument sued upon would be valid as a certificate of indebtedness, if not as a note, and against it the prescription of ten years, but not of one year, would be applicable.

Peter James v. Mrs. M. J. Lewis and Husband, 664.

SEE CRIMINAL LAW, No. 15—*State v. Tinney*, 460.

SEE RES JUDICATA, No. 4—*Succession of Jean Marie Sarniquet*, 419.

SEE DONATIONS, No. 4—*Wade v. Eames*, 449.

SEE PLEADINGS, No. 5—*Whetstone v. Rawlins*, 474.

SEE BILLS AND PROMISSORY NOTES, No. 14—*Spearing & Co. v. Succession of Zacharie*, 496.

SEE AUCTIONEERS, No. 2—*State v. Blohm et als.*, 538.

SEE EVIDENCE, No. 38—*Petetin v. Boagni*, 607.

SEE BONDS, No. 10—*Clements v. Biossat, et als.*, 243.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676.

SEE DAMAGES, No. 1, 2—*Campbell v. Miltenberger*, 72.

SEE DAMAGES, No. 5—*Wood v. Harispe*, 511.

SEE TAXES AND TAX COLLECTORS, No. 2—*Dunlop & McCance v. Minor*, 117.

PRIVILEGE.

1. Another fatal bar to plaintiffs' right to recover, is the want of registry of their privilege, if they were entitled to one. The law grants a privilege for five days. The sale was recorded eight days after it was made, and two days after this suit was instituted. Therefore, plaintiffs had lost their privilege as to the intervenors.

H. M. Horrell & Co. v. H. N. Parish, 6.

2. A contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral not transferred or delivered in pursuance of said contract or promise.

Succession of A. H. D'Meza, 35.

3. The recording of a privilege too late, is equivalent to not recording it at all, so far as the seizing creditors are concerned; and recording it after the property upon which alone it can be executed has been seized and taken possession of by the sheriff and thus put away from the control of the defendant, does not affect the seizing creditor's rights.

Lapene & Ferre v. Edward Meegel; John H. McKee v. Edward Meegel—Consolidated with interventions and third oppositions of Greve, Wilderman et als, 80.

PRIVILEGE—Continued.

4. It is well settled that men who furnish materials have no privilege, if the contractor with whom they dealt had none.

The acknowledged account of plaintiffs against Allison, the contractor, did not give them a privilege on the property of defendant, for whose buildings Allison had bought materials from them. At most it only entitled them to such privilege as Allison might have. Having failed to record his contract, Allison had no privilege; consequently the plaintiffs are in the same category.

Whatever sum the defendant may have in her hands, due on her contract with Allison, after deducting the amount expended to complete the buildings subsequently to Allison's abandonment of his contract, belongs to Allison, and it certainly can not be distributed among his creditors in this proceeding, because he is not a party.

The plaintiffs, who are creditors of Allison, have shown no authority from him to collect from defendant whatever sum she may owe on a final settlement.

Baker & Thompson v. Mrs. A. L. Pagud, 220

5. This suit was instituted to enforce the vendor's privilege on certain barrels of flour shipped for Liverpool, for which the whole price had not been paid. The Citizen's Bank intervened, claiming the control of the property by virtue of the bills of lading upon which it had made advances to the shippers. In this court the bank pleaded specially the want of registry necessary to preserve the plaintiffs' privilege. The plaintiffs objected that the question was not raised in the lower court, and that as, under article 805 C. P., the Supreme Court can only execute its jurisdiction in so far as it shall have knowledge of the matters argued or contested below, the point can not be urged here.

This objection is not well founded, because the matter contested below was the privilege claimed by the plaintiffs, and as they have failed to show that they have preserved their privilege in the manner prescribed by law, they can not enforce it to the prejudice of the intervenor, holding the evidence of title.

Glover & Odendahl v. George B. Shute. Citizens' Bank of Louisiana intervenor, 350.

6. As to third parties, privilege can have no effect unless duly recorded. This is the settled jurisprudence of this State since the adoption of the constitution of 1868. There is, in this instance, no evidence of the registry of any privilege in favor of the intervenors. It is not necessary therefore to discuss the effect of the possession of the railroad receipt for the cotton on which a privilege is claimed.

Fargason & Olay v. W. B. Johnson & Son—John Williams & Sons, Intervenor, 501.

PRIVILEGE—Continued.

7. Plaintiff claims a privilege on the buildings which he and his partner, now deceased, erected on a certain piece of ground to which neither of them claimed title, and for the erection of which he paid bills to a certain amount. But this the law does not allow. He stands in the position of a partner who has advanced his partner's proportion towards the construction of certain buildings. It is not to parties occupying such relations that privileges are given.

J. M. Pool v. L. Fontelieu, Public Administrator, 613.

8. It is false doctrine to say that, where a factor who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed first to the payment of the mortgage debt, the residue going to discharge the debt incurred for supplies. The privilege rests upon the crop, and this privilege the crop must first discharge before any part of it may be applied to any other obligation.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 651.

9. Tobacco, pipes, whisky, cards, perfumery, etc., etc., are in no sense supplies necessary to make a crop. For such supplies the law allows no privilege.

S. Q. C. Stafford, Tutor, v. William L. Pearson and R. F. Williams, 658.

10. When the act of sale contains the pact *de non alienando*, no matter through how many hands the property sold has passed, so long as the price agreed to be paid remains due, the vendor has the right to proceed directly against the vendee, regardless as to who is in possession of the mortgaged premises.

The fact that the property was not divided into lots of fifty acres or less, according to article 132 of the constitution, is not sufficient cause for annulling the sale on the relation of the plaintiff, who complains of the illegality of the executory proceeding under which it took place.

Thomas B. Stevens v. Ed. F. Pinneo et als., 617.

SEE TAXES AND TAX COLLECTORS, Nos. 1, 2—*Dunlop & McCance v. H. D. Minor*, 117.

SEE HOMESTEAD, No. 3—*Succession of Wm. Cooley*, 166.

SEE SEIZURES AND SALES, No. 13—*Wang v. Spencer Field*, 349.

SEE CORPORATIONS, No. 8—*Eddy v. City of Shreveport*, 636.

SEE OBLIGATIONS AND LIABILITIES, No. 3—*Meyer v. Frederick*, 537.

PROHIBITION.

1. It is well settled that this court will not exercise a supervisory control over the district courts, and that the writ of prohibition

PROHIBITION—Continued.

will not be used except in aid of the appellate jurisdiction of this court. Relators have mistaken their remedy in this instance; it is not a writ of prohibition, but an appeal from the order of the Superior District Court, ordering the transfer of the suit of relators from the Sixth District Court to that court.

State ex rel. Semmes & Mott v. The Judge of the Superior District Court, parish of Orleans, 146.

PROMISSORY NOTES.

SEE BILLS AND PROMISSORY NOTES.

PROTEST AND NOTICE.

1. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and the evidence in this case supporting the legal presumption resulting from the acceptance of the draft, that the drawers, either had funds in the hands of the acceptors, or, at any rate, had reasonable grounds to expect that their draft would be honored, said drawers were entitled to notice of dishonor, and on failure thereof were discharged from liability.

John A. Eastin v. Succession of William H. Osborn, 153.

2. From all the evidence on record in this case it results that the defendants, when they drew the draft sued upon, had a just right to believe that it would be duly honored. Therefore, they were entitled to due protest and notice of the dishonor of the bill. With regard to the promise of payment alleged to have been made by the defendants, it was coupled with conditions which were not accepted, and for that reason it can not entitle the plaintiffs to recover. *L. H. Gardner & Co. v. J. J. McDaniel & Co.*, 472.

3. The defense in this suit based upon a promissory note is: That the defendants are not personally bound, as they acted as a committee in behalf of the Butchers' Benevolent Association.

The note reads thus: "The Butchers' Benevolent Association v. The Crescent City Live Stock and Slaughterhouse Company, No.—, Sixth District Court, parish of Orleans. We, the undersigned, hereby bind ourselves to pay *in solido*, to Cooley & Phillips, attorneys at law, the sum of one thousand dollars, as soon as the above styled suit shall have been finally decided, being for professional services to be rendered by said Cooley & Phillips to the plaintiffs in the above suit." Signed, Paul Esteban, J. T. Aycock, Dugue Verges, special committee.

This court thinks the signers of the obligation sued upon, bound themselves to pay the sum promised. There is nothing ambiguous in the written obligation; but if, by any perversion of language, the phrase "*we, the undersigned, hereby obligate ourselves to pay,*"

PROTEST AND NOTICE—Continued.

could be made to mean the *Butchers' Benevolent Association* obligated themselves to pay, this court would then be at a loss to know the sense of putting the words *in solido* in the obligation. Besides, it appears from the evidence that the plaintiffs required that their fees should be *secured*. Of course, the Association's obligation was not *secured* unless the defendants were personally bound. The plea that the suit is premature should have been filed *in limine litis*. It was too late after answer filed.

Cooley & Phillips v. P. Esteban et als., 515.

SEE BILLS AND PROMISSORY NOTES, No. 3—*Samuel Jamison v. J. H. Pothaus et als.*, 63.

SEE BILLS AND PROMISSORY NOTES, No. 19—*Johnson v. Flanagan et al.*, 689.

RES JUDICATA.

1. The plea of *res judicata* is not tenable when the decree referred to in support of the plea declares that a judgment of nonsuit is rendered. *John A. Eastin v. Succession of Wm. H. Osborn*, 153.
2. The plaintiff sues to have defendant declared the father of her illegitimate child and to have him condemned to pay a certain sum for alimony to said child. One of the pleas of the defense is *res judicata*. There was a previous suit between the same parties for the same cause of action in the Fourth District Court, parish of Orleans, with the exception that, in said suit, the plaintiff had also claimed damages on the ground of injury done to her character and reputation by seduction. There was judgment, on the twenty-eighth of February, 1872, dismissing the claim of the minor child for alimony; and, on the next day, twenty-ninth of February, the claim of the mother for damages having come to trial before a jury, was dismissed on motion of her own counsel. The order of the twenty-eighth of February, dismissing the minor's claim for alimony, was not entered on the minutes through clerical error, and in May following, on motion of defendant contradictorily with plaintiff, said judgment against the minor was entered *nunc pro tunc*.

The court *a qua* had the power to make this correction of the minutes, and to cause the judgment to be properly entered as was done. It follows that the plea of *res judicata* must be sustained.

Mary Hardy, for the use of her child v. John E. Stevenson, 236.

3. In May, 1872, plaintiff instituted a suit against the parish of Ascension to compel the president of the police jury and the treasurer of the parish to satisfy his claim for damages in consequence of the destruction of his boat by a mob. The suit was based upon resolutions of the police jury passed in 1871, authorizing the set-

RES JUDICATA—Continued.

tlement of said claim by giving to plaintiff the bonds of the parish for \$7585, but which resolutions were subsequently repealed. There was judgment against plaintiff who appealed. This appeal, however, was subsequently abandoned.

In May, 1873, the present suit was instituted. The demand is to enforce what the plaintiff calls a compromise offered by the parish in the resolutions of 1871, before mentioned. The defense is the plea of *res judicata*.

The only difference between the suit before the court and the one decided in May, 1872, is that the plaintiff now asks for a judgment for \$7585 in *dollars*, whereas before he asked for the *bonds* of the parish for that amount. The plea of *res judicata* must prevail.

It matters not in what form the question may have been presented, if the same question once judicially decided between the same parties be again agitated, it must be regarded as the thing adjudged.

It is certain that, had the plaintiff succeeded in the former suit, he could not have instituted the present one.

Another test is that the same evidence will support both actions.

There is no force in the objection that this court can not pass upon the exception of *res judicata*, because the court *a quo* did not. By agreement the exception was referred to the merits, and the judge *a quo*, being of opinion that the defendant was entitled to a judgment on the merits, expressed no opinion as to the exception. But the whole case is before this court as it was before him. The court, therefore, is not precluded from deciding this question.

Thomas Brady v. Parish of Ascension, 320.

4. In 1867, in opposition to an application of the natural tutrix of Philomena Sarniquet for a sale of property belonging to the succession of Jean Marie Sarniquet, father of said Philomena, Joseph Sarniquet set up, without success, his title as sole legal heir of his deceased brother, said Jean Marie Sarniquet. The issue is therefore *res judicata*. He can not now revive the question by bringing suit and alleging that Philomena Sarniquet is not the legitimate daughter of Jean Marie Sarniquet and not entitled to his property. The prescription of ten years is also pleaded correctly. Philomena Sarniquet, now of age, but an idiot, has, through her tutrix, been in possession of the property as heir for twenty years. Hence the prescription of ten years is a complete bar to the action.

Succession of Jean Marie Sarniquet and Interdiction of Philomena Sarniquet—Consolidated, 419.

SEE EVIDENCE, No. 5—*Bonella & Oaballero et als. v. Charles Maduel*, 112.

SEIZURES AND SALES.

1. Where the ground for injunction was that the advertisement purports to sell movables at the courthouse, which can only be done at the place of seizure:

Held—That when a plantation and its fixtures are to be sold under a mortgage as in this case, the sale must be made at the seat of justice unless the debtor require that it be made on the plantation.

The advertisement, in this case, describes the articles, called movables by plaintiff, as constituting a part of the buildings and improvements on the plantation, and with one or two trifling exceptions, they are what the law subjects to the mortgage existing on the plantation; but, if they were movables, it would not be a ground for injoining the sale of the property subject to the mortgage, and besides, the plaintiff has not requested the sale to be made on the plantation. *A. W. Walker v. E. Villavaso*, 42.

2. An error in the calculation of interest on the judgment rendered and sought to be executed, is no ground for an injunction. If any error in this respect exists, it can be corrected on a settlement at or after the sale, should the property sell for more than the mortgage debt for which the seizure was originally made. The sale must proceed under the order of seizure and sale, even if the *fieri facias* be issued for too large a sum. *Ibid.*

3. The affidavit on which the writ of provisional seizure issued in this case is insufficient. It was made by a person not shown to be one of the parties, or their attorneys, or a party to the suit.

The affidavit authorized and prescribed by the law is one made by the party or his attorney. One made by any other person is not authorized by the law, and, as the formalities required in the issuance and execution of these harsh remedies must be strictly observed, the affidavit in this instance must be held invalid.

S. Fernandes & Co. v. Elias Miller, 120.

4. Some personal property of Weiss, attached at the suit of Joseph Hoy & Co., was ordered to be sold as perishable property pending the attachment suit and bonds were taken by the sheriff for the price thereof.

The bonds, therefore, simply represented the property attached or the proceeds of the sale thereof and they belonged to Weiss, not to the sheriff, who was a mere stakeholder. There existed no reason why the sheriff could not seize them at the suit of another creditor, as the property of Weiss, subject of course to the prior attachment.

The suspensive appeal taken by Joseph Hoy & Co., from the judgment dissolving their attachment could not prevent Eaton & Barstow from seizing the property attached.

Joseph Hoy & Co. v. Eaton & Barstow and Sheriff, 169.

SEIZURES AND SALES—Continued.

5. The judgment of the district court dissolving the attachment of Joseph Hoy & Co., having been affirmed on appeal, said attachment could not stand in the way of the rights of Eaton & Barstow resulting from their seizure, and the proceeding by garnishment on the part of Joseph Hoy & Co. against the sheriff after said seizure, did not affect it, or the rights of Eaton & Barstow under it—being *res inter alios acta*.

The right to point out property to be seized, or to object to the seizure of one species of property instead of another, is personal to the debtor, and Weiss, the debtor, not having complained, Joseph Hoy & Co. had no right to do so. *Ibid.*

6. On the thirtieth of April, 1870, the plaintiffs sold to the defendants the undivided half of a tract of land situated in the parish of Plaquemines, for a certain amount cash and the remainder in three joint promissory notes, due in one, two and three years, and secured by mortgage on the property sold. On the fifth of August, 1871, said property, at the suit of Chaffraix & Agar, was sold and adjudicated to pay the first of said promissory notes. On the second of September, 1872, the said Chaffraix & Agar obtained another order of seizure and sale predicated upon the same mortgage and one of the notes—the second installment of the mortgage debt—to sell the same property previously seized and sold under the first order of seizure and sale.

Packard, one of the purchasers, in 1870, by contract with the plaintiffs, and subsequently under the sheriff's sale, in 1871, of a portion of the mortgaged property which had been divided into lots, has arrested by injunction the sale ordered in 1872, on the following grounds: That the said property was sold and adjudicated on the fifth of August, 1871, in the undivided half of fifteen lots, by an order in the case of the plaintiffs, Chaffraix & Agar, against the same defendants, to satisfy the mortgagees' rights upon said lands *in toto*; that a sufficient amount of cash was required for the matured note and costs; that the balance of the lots were sold upon terms of payments to meet the *unmatured notes*; that the land of said plantation was now owned in separate lots by the persons to whom they were adjudicated at said sale; that by said sale all the mortgages and privileges followed the proceeds, and that the whole of said undivided half so sold was relieved therefrom; that said plantation was no longer the joint property of these defendants; that plaintiffs' rights sought to be enforced are extinguished; that this defendant having purchased and paid for certain distinct lots, is now the owner of the same, unincumbered, and the seizure and attempted sale of the alleged half of said tract

SEIZURES AND SALES—Continued.

is an unwarranted usurpation of his rights and will work him an irreparable injury.

These allegations do not warrant an injunction. They are inconsistent, and the legal deductions drawn from them are incorrect. The plaintiff in injunction first states that the sale on the fifth of August, 1871, was made for cash to pay the matured note, and avers that the balance of the lots were sold on credit to meet the notes not due, and yet he alleges that the sale extinguished the debt and mortgage upon the whole tract, and that he bought certain of the lots and paid for them in full, wherefore he claims to be the sole owner thereof with an unincumbered title and has the right to arrest the sale of the undivided half, although the other purchasers do not complain. The order of sale described by him and annexed to his petition did not authorize the sale of certain of the lots for all cash, and the balance of the lots all on credit, and such sale by the sheriff would be simply null. In the opinion of this court, defendant's allegations in this case, taken altogether and as true, do not show a sale that in the least affects plaintiffs' right to enforce the mortgage by which their notes are secured.

If the defendant Packard, bought two lots or the whole of the undivided half of the plantation, under the order of court and executory process on which he relies, he only acquired thereby the rights of himself and his co-debtors, and they had no rights under the law and their contract, which could impair the plaintiffs' right to have their unmatured notes paid according to their original contract for their payment.

Chaffraix & Agar v. Christopher O. Packard et als., 172.

7. Where the debtor and owner becomes the purchaser, the sale does not extinguish the debt and mortgage not actually paid by the proceeds of the sale—the debtor being bound by his contract and not being able to extinguish his debt except by payment according to his stipulations.

If Packard had bought the whole plantation and paid the debt then due, he and the land would have remained bound for the portion not due, and the holders of the notes representing such portion could proceed to enforce the payment thereof. The sheriff could have canceled the mortgage only to the extent of the debt actually paid. Packard can not be put in any better condition by being the purchaser of only a portion of the mortgaged property and paying, as he contends, the whole of his bid, which was more than his share of the debt as one of the three co-obligors.

A sale of mortgaged property for cash to pay the instalment due and on a credit to meet those not due, does not extinguish the mortgage as to the latter.

SEIZURES AND SALES—Continued.

If, under the circumstances of the purchase, the defendant Packard has to pay more than his virile share, as he seems to fear, he may have recourse upon his co-obligors. *Ibid.*

8. To the demand of Dunbar individually against Johnson on promissory note given for mules, which the former sold to the latter, the defense is the plea of eviction. Johnson acquiring the mules from Dunbar individually permitted them to be sold, without resistance, for a certain tax due by the succession of one Crouch, of which Dunbar was administrator, and repurchased the same at that sale. That this change of title in his hands amounted to an eviction constituting a valid defense to the payment of the note he gave Dunbar individually for the price of the mules, is hardly worthy of consideration.

Where in regard to a price of land belonging to the succession of Crouch, bought by Johnson at a sale by the revenue tax collector of the United States, it was contended that the administrator of said succession could not disregard Johnson's title and attack it collaterally by proceeding to sell the said land under order of the probate court;

Held—That the pretended sale consisted in a mere notarial conveyance, without an offering and, an adjudication, made twenty-five miles from the place where the distraining was effected; that such a conveyance was an absolute nullity, and that the administrator of the succession was not bound to bring a direct action to have the nullity thereof pronounced.

W. J. S. Johnson v. J. C. Dunbar, Administrator. J. C. Dunbar v. W. J. S. Johnson. (Consolidated), 188.

9. The bill of exceptions to the ruling of the court *a qua*, admitting proof to show the fact that there was no adjudication of the property to Johnson by the tax collector, was not well taken. There was actually no sale, and the administrator was not bound to tender to Johnson the price of the pretended sale.

Besides, the next year after the acquisition of his pretended title, Johnson rented the land in controversy from the administrator of the succession—thereby, in effect, conceding his want of title and acknowledging that of his adversary. *Ibid.*

10. A third opposition is allowed, first, when the third person making the opposition pretends to be the owner of the thing seized; second, when he contends that he has a privilege on the proceeds.

In this instance it is not contended that the minors on whose behalf an intervention is made, own the property seized; and if they had a privilege on its proceeds, about which this court says nothing, it could only be enforced when the sale had been effected. It has

SEIZURES AND SALES—Continued.

not been shown that there is any law authorizing a judge to order, as he did, the sheriff to make no title to property to be sold under execution unless it bring the price fixed upon by him.

Desiree Hickman v. Amos B. Thompson, 260.

11. Plaintiff, alleging to be the heir of one Mrs. Brady, sues to be recognized as the owner of one-half of a certain lot of ground, and for the payment of the rent thereof at the rate of fifty dollars per month from the first of February, 1867—which lot of ground belonged to the community existing between the deceased and her husband. After the death of Mrs. Brady the property, which was incumbered with a mortgage, was sold under executory process and bought by the defendant at the sheriff's sale thereof. This defense is valid. *Mary Ann Riley v. Mr. and Mrs. Condran*, 294.

12. The defendant appeals from a judgment annulling an act of sale to him of plaintiffs' property under the enforcement of a judgment. There is no evidence in the record that the property was seized by the constable who effected the sale, nor that there was a sufficient advertisement. It is proved positively that the appraiser in behalf of Gallagher and wife was appointed by a justice of the peace. A justice of the peace has no authority to appoint an appraiser in behalf of the defendant in execution at a forced sale.

An appraisement made by parties unauthorized to act is no appraisement. The property of the plaintiffs was therefore sold without appraisement, and the sale was invalid.

The objection that the plaintiffs have not returned nor offered to return the price of adjudication, and therefore ought not to succeed in their suit, has no force. The plaintiffs have received nothing to return, the defendant having purchased under his own execution. If he paid to the constable the balance of his bid in excess of the amount of the writ, that sum is yet in the hands of said constable. The plaintiffs, finding that their property had been illegally seized, refused to ratify the sale by claiming the balance of the funds in excess of the amount of defendant's writ.

Patrick Gallagher and Wife v. B. Abadie, 343.

13. The proceedings in this case appear to have been irregular. The plaintiff founds his right upon the provisions of article 3268 of the Civil Code, and yet he has failed to comply with its provisions. No separate appraisement was made of the lot of ground and the building he claims a privilege upon. The building was sold separately and without any reference to the ground it stood upon; in other terms, as if there were no connection whatever between them and no rights against both existing in other persons. Under this state of facts the sale of the house was a nullity.

Frederick Wang v. Spencer Field, 349.

SEIZURES AND SALES—Continued.

14. The proceeding sought to be enjoined in this case was predicated on the mortgage note of Joseph O'Hara, deceased, and in order to make a valid sale of the mortgaged property, the legal representative of his succession should have been made a party to said proceeding.

Notices served upon the plaintiff before she was confirmed as natural tutrix, and as such administering said succession, were not sufficient. The proceeding taken against her before her appointment, was in no sense a proceeding had contradictorily with the succession of O'Hara, the mortgage debtor.

This court cannot assent to the proposition set up in defense, that the notices were sufficient, because subsequently to the mortgage, O'Hara donated the mortgaged property to the plaintiff, his wife, and that the succession of O'Hara, having no interest in the mortgaged property, was not a necessary party.

The proceeding was on the mortgage note of O'Hara, and therefore the legal representative of his succession was a necessary party to any suit or other proceeding on that note.

Besides, if it were true that the property passed into third hands subsequently to the mortgage, no proceeding by executory process could be had, because in the act of mortgage there was not the *non alienando* clause.

The plaintiff, however, can not disavow her judicial averment that the mortgaged property belongs to the succession of her deceased husband.

Mrs. A. G. O'Hara, Natural Tutrix, v. J. N. Folwell, 370.

15. In the order of seizure and sale appealed from, the court *a qua* erred in granting five per cent. for attorney's fees, as the amount of attorney's fees was not fixed in the act of mortgage. The right of plaintiff to sue for attorney's fees hereafter is reserved to him.

Julius Socha v. Mrs. Louisa Renaldo, 500.

16. In the order of seizure and sale sued out against the defendants, who are third possessors of the mortgaged property, there are two fatal defects:

First—The mortgageor is not made a party.

Second—The mortgage does not contain the nonalienation clause.

The plaintiff has mistaken his remedy. It is in a hypothecary action.

Octave Reggio, Curator v. Blanchin & Giraud, 532.

17. When the district court had before it sufficient authentic evidence to justify an order of seizure and sale, if there were irregularities in the advertisement of the property, they are not to be corrected in an appeal from said order.

Mrs. Emilie Hoa v. Mrs. Mary Clancy, 537.

SEIZURES AND SALES—Continued.

18. The Ingleside plantation was seized and sold in the suit of Pargoud v. Mrs. Richardson. Pargoud became the purchaser. The seizure was not released, neither did Mrs. Richardson leave the plantation which is situated within a short distance of the residence of the sheriff and Pargoud. She cultivated the land and made thereon a crop of cotton and corn with her own means, except three hundred dollars, which the sheriff paid to the hands, and which were returned to him. After she had removed some of the cotton, she was enjoined from taking anything more off the place.

The injunction was properly dissolved. It is impossible, under the circumstances, for Pargoud and Dinkgrave not to have known that she was cultivating the plantation. There is neither law nor justice in depriving her of what she made.

Mrs. Sarah Richardson v. B. H. Dinkgrave, Sheriff et al., 632.

19. Older & Chandler, the defendants in this case, were not the owners of the property attached. The document relied upon to establish their ownership is not an unconditional sale. It was a mere agreement that whenever they should pay a certain amount of money, the property should be transferred. In the meanwhile the property belonged to Barnum & Co., and was hired by them to Older & Chandler, and was not liable to be seized to pay the debts of the latter.

Frank Stevens v. Older & Chandler—P. T. Barnum & Co., Interveners, 634.

20. This is a suit by plaintiff, individually and as administrator, to annul a certain order and judgment and the sale of certain lands made by the sheriff to the defendant in fraud, as alleged, of the creditors of the succession of which he is the administrator.

The sheriff in his return states that the sale, the validity of which is contested, was advertised by posting at the door of the courthouse, and two other public places in the parish, there being no newspaper in the parish selected according to section 15, act No. 8, approved July 24, 1868, to perform, print and publish parochial and judicial advertising. It is only after the official journal is selected and notice thereof given to the sheriff, that his advertisements are null if not published in such journal. No such selection and notice are proven in this case; hence the presumption must be in favor of the officer.

The sale was made on a mortgage created before the provision of the constitution in regard to dividing lands into small lots was put in operation, and therefore can not be affected by it.

The record does not show that the price was less than the first or previous mortgage. But it appears that the only mortgage of an

SEIZURES AND SALES—Continued.

older date than the ones on which the order of seizure and sale issued, was actually owned by the purchaser, plaintiff in the proceedings.

The judge *a quo* did not err in excluding evidence offered to prove plaintiff's alleged special mortgage, as the judgment obtained by him did not contain its recognition.

The subject of a violation of an alleged agreement not to sell the property, but to cultivate the lands, has already been settled by this court as not being a legal ground for not causing the property to be sold, and *a fortiori*, is not a good ground to annul the sale.

E. D. Duckworth, Individually and as Administrator v. Isaac B. Payne et al., 683.

21. Where the order directs the mortgaged property to be sold according to law, and the writ of seizure has no reference whatever to a certain sum of \$49 80, as insurance premium, the plaintiff must be presumed to have abandoned the claim first set up for it.

Widow George L'Hote v. Andre Dubuch and Widow Dubuch, Administratrix, 717.

22. The plaintiff shows a just title to the property which he claims, and which was not divested by the pretended sale to the defendant, under a personal judgment of the City of Jefferson, now a part of New Orleans, *v. J. J. Scharge*. The plaintiff was neither a party to the suit nor the sale, and the writ was not directed against him. Besides, the sale was made after the return day of the writ had expired, and the constable failed to return it and retain a copy as required by law.

George Jacobshagen v. John Moylan, 735.

23. Execution having issued on a judgment obtained by R. A. Hunter in a former suit against Richardson, the plaintiff in this case, a tract of land belonging to said Richardson was sold, and Benjamin K. Hunter, the principal defendant in the present suit, became the purchaser. On a devolutive appeal taken by Richardson, the judgment thus obtained against him was annulled by this court on the ground that the citation was null, having issued in the parish of Rapides and been served upon Richardson in the parish of Sabine, the parish in which he resided and had his domicile. This action is brought by Richardson against said purchaser of the land at sheriff's sale in the suit of Robert A. Hunter against Richardson. In so far as Benjamin K. Hunter is concerned, the proceedings in the case of Robert A. Hunter *v. Richardson* are regular. There was a petition, citation, answer and judgment. Notice of seizure was given and notice to appoint appraisers, and an appointment of an appraiser by the defendant followed by a sale. Under these cir-

SEIZURES AND SALES—Continued.

cumstances the sale, as to third persons, transferred the title to the property sold. The plaintiff's recourse, if he have any, is against Robert A. Hunter.

Thomas A. J. Richardson v. Levin P. Smith et als.—R. A. Hunter, Warrantor, 746.

SEE INJUNCTION, No. 4—*A. Whitney & G. W. Whitney v. B. Saylor, 40.*

SEE INJUNCTION, No. 12—*Augustin v. Dours et als., 261.*

SEE PAYMENT, No. 1—*Snodgrass v. Adams, 235.*

SEE MORTGAGE, No. 9—*Guilbeau v. Wilts, 600.*

SEE MORTGAGE, No. 4—*Fleitas v. Consolidated Association of the Planters of Louisiana, 223.*

SEE COMMUNITY, No. 3—*Ricker v. Widow and Heirs of Pearson, 391.*

SEQUESTRATION.

1. The motion to dissolve the sequestration should have been made absolute. The requisite oath was not made. The affiant did not state that he feared or believed that the property on which the privilege exists would be removed out of the jurisdiction of the court, or concealed, parted with or disposed of pending this suit.

Blanc & Legendre v. Wallace & Choppin et als., 492.

SEE LEASE, No. 6—*Silliman v. Short & Martin et al., 512.*

SEE JURISDICTION, No. 12—*Bradley & Co. v. Woodruff et al., 299.*

SEE BONDS, No. 10—*Daly v. Duffy et al., 468.*

STAMPS.

SEE BILLS AND PROMISSORY NOTES, No. 18—*Pargoud v. Mrs. Richardson, 672.*

SHERIFF.

1. Potthoff & Knight instituted a suit against Hill, the drawer of a note, obtained judgment, issued execution, and on the judgment not being satisfied, sued O'Hara the indorser, who, after judgment against him, paid the amount thereof. The present suit is brought by O'Hara against the sheriff and his sureties to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission amounting to malfeasance and nonfeasance in office.

The error in this case lies in the assumption that there was any subrogation in the judgment of Potthoff & Knight against O'Hara, to any right which Potthoff & Knight had against Schwab and his sureties by reason of any neglect, if neglect there was, in executing the *fleri facias* which had been placed in his hands. The

SHERIFF—Continued.

sheriff may have been responsible to them, but he was not responsible to O'Hara, who was no party to the suit from which execution issued.

Therefore the conduct of the sheriff in the case of *Potthoff & Knight v. Hill* can not give rise to any action against him and his sureties in the case of *Potthoff & Knight* against O'Hara.

C. J. O'Hara v. N. Schwab et al., 78.

2. After sequestration, a certain quantity of sugar and molasses was, by agreement of the parties, shipped by the sheriff to the firm of Da Silva & Weysham, the proceeds to be held by the sheriff subject to the decision of the court.

By this agreement the parties made the sheriff their agent, and as he was not therein acting in his official capacity, his sureties are not liable for his failure to pay over the money. But he is personally liable, as it is shown that he has several times promised to pay the plaintiff the sum claimed, and there being an obligation on which the promise is based, and the evidence being received without objection.

E. J. Gay & Co. v. J. B. Lejeune, Jr., et als., 250.

3. An incoming sheriff has not the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs and for which the outgoing sheriff and sureties are liable on his official bond.

It will hardly be held that when a sheriff becomes *functus officio* he can execute writs and process of courts in his possession remaining unexecuted. His mission is completed and his authority to actively enforce the laws is at an end. But there is no impropriety or unfitness in his paying over moneys which he has in hand to the party legally entitled to receive it. He is responsible for it and not the incoming sheriff, and the right of the latter is unwarranted by law.

C. S. Sauvinet v. Thomas S. Maxwell, 280.

4. It is evident that judgment in damages against the civil sheriff for effecting the sale complained of, is erroneous, as he was acting only under the direction of a court of competent jurisdiction and carrying out its orders.

The sheriff seems to have been informed that a suit in interdiction had been instituted against the owner of the property seized, but that was no warrant for him to stop the sale. It did not follow that interdiction would result from the suit. If the parties in interest had desired to stop the sale, they should have enjoined it.

Joseph Rau, Curator of Henrietta Hooker, v. Moses Katz, et als., 463.

SHERIFF—Continued.

5. The sheriff of a different parish from the one in which the suit is instituted is not required by law to serve civil process in his own parish, which has emanated from the parish where the suit was instituted, without being paid in advance the fees established by law for such service.

Section 7 of the act of 1870, p. 165 (Ray's Revised Statutes, p. 369, section 17,) applies only to the sheriff and clerks of the parishes in which the suits are instituted.

In this case it is not found in the record that the defendant, sheriff of the parish of Ouchita, was informed of the near approach of the period which was to extinguish plaintiff's claim by prescription, nor that the plaintiff used that degree of diligence which would naturally be expected from men of prudence and caution to avoid a heavy loss.

Without leaving out of view the important fact that public officers should be held strictly responsible for injuries or loss that may arise from a refusal or culpable neglect to perform their duties, this court must advert to the want of right in litigants to require their services without reasonable assurance of the payment of the fees allowed them by law, and without subjecting them to delay or inconvenience in receiving the same.

N. B. Adams v. B. H. Dinkgrave, et als., 626.

6. The defendant, ex-sheriff, having turned over all the papers, writs, etc., of his office, including the receipts of the keepers of the property attached, to his successor, without objection, while the attachment writs were pending and long before this and the other plaintiffs had obtained judgment, and the incoming sheriff having accepted the keepers of said property and made them his own, the defendant (out-going sheriff) is, under such circumstances, released from responsibility for its safe keeping.

John N. Coleman v. John J. Hope, 629.

SEE SEIZURES AND SALES, No. 20—*Duckworth v. Payne, et al., 683.*

SEE ATTACHMENT, No. 3—*Chaffe, Shea & Love v. Abercrombie, 685.*

SEE ATTACHMENT, No 4—*Scott v. Davis, 688.*

SEE SUBROGATION, No. 2—*D. Durac v. Widow Ferrari et al., 114.*

SEE PRESCRIPTION, No. 1—*State of Louisiana v. Ranson, Tax Collector, 125.*

SEE INTERVENTION, No. 4—*Hickman v. Thompson, 260.*

SEE BONDS, No. 14—*Levin et als. v. Lacey et als., 270.*

SEE SUBROGATION, Nos. 3, 4—*Dockham, wife, v. City of New Orleans, 302.*

SEE DAMAGES, No. 4—*Cohen & Wilson v. Avery et als., 359.*

SUBROGATION.

1. Potthoff & Knight instituted a suit against Hill, the drawer of a note, obtained judgment, issued execution, and on the judgment not being satisfied, sued O'Hara the indorser, who, after judgment against him, paid the amount thereof. The present suit is brought by O'Hara against the sheriff and his sureties to make him and them responsible for not having collected the amount of Potthoff & Knight's judgment against Hill, alleging various acts of omission and commission amounting to malfeasance and nonfeasance in office.

The error in this case lies in the assumption that there was any subrogation in the judgment of Potthoff & Knight against O'Hara, to any right which Potthoff & Knight had against Schwab and his sureties by reason of any neglect, if neglect there was, in executing the *feri facias* which had been placed in his hands. The sheriff may have been responsible to them, but he was not responsible to O'Hara, who was no party to the suit from which execution issued.

Therefore the conduct of the sheriff in the case of Potthoff & Knight *v.* Hill can not give rise to any action against him and his sureties in the case of Potthoff & Knight against O'Hara.

C. J. O'Hara v. N. Schwab et al, 78.

2. The subrogation relied on in this case by Goulard, the third opponent was not effected in conformity with article 2160, R. C. C. This article is very explicit. The act of borrowing and the receipt must be executed in the presence of a notary and two witnesses. In this instance the receipt was given by the sheriff, and should have been rejected on the objection made by plaintiff. It is not an authentic act by law, and is not in the form of receipt required by the above mentioned article of the Civil Code. The subrogation therefore attempted in favor of Goulard, the third opponent, is without legal effect against any one having adverse claims such as the plaintiff or his transferee has shown himself to possess.

D. Durac, Jean Bazus, transferee v. Widow J. B. Ferrari, Louis Goulard, third opponent, 114.

3. In September, 1872, Potter, subrogee of the judgment styled Josephine Lacoste *v.* Mary Ann Nugent, who is represented as being no other person than Mary Ann Dockham, issued execution and seized under garnishment process the judgment of the plaintiff, Mary Ann Dockham *v.* The City of New Orleans. Before the garnishment proceeding was tried, to wit, in November, 1873, Mrs. Jane O'Rourke, subrogated to the judgment of the plaintiff against the city, filed a rule for the parties in interest to show cause why the amount of said judgment should not be paid to her.

SUBROGATION—Continued.

It is evident that Potter has a right to the judgment in controversy, which is superior to that of the plaintiff in rule, because the seizure under garnishment proceeding was made before the city was notified of the transfer of the judgment to Mrs. O'Rourke, plaintiff in rule. Until this notice was given to the judgment debtor the transferee was not possessed of the judgment, so far as Potter, a third person, was concerned.

Mary A. Dockham, Wife, etc., v. City of New Orleans. Jotham Potter, Subrogee, 302.

4. To the objection that the judgment in the case of Josephine Lacoste v. Mary Ann Nugent was a nullity, because the agent who confessed judgment was unauthorized to do so, the answer is, that the judgment was consented to by an attorney at law in behalf of Mary Ann Nugent, and his authority was not denied under oath.

It is further objected that the seizure lapsed because the sheriff detained in his hands beyond the seventy days the *feri facias* upon which the garnishment process issued. This court finds that the writ was returned and a copy issued by the clerk upon which the seizure continued, in strict compliance with the law. Besides, an irregularity of this kind on the part of the sheriff would not release the seizure nor destroy the lien acquired thereby. *Ibid.*

SEE INSURANCE No. 12—*Carroll & Co. v. New Orleans Jackson and Great Northern Rail Road Company, 447.*

SUCCESSION.

1. The acceptance of a succession is express, when in an authentic or private instrument, or in some judicial proceeding, the purpose of the heir is declared in terms so clear and distinct that no doubt can exist of his intention to accept under the responsibilities that result from an acceptance pure and simple. To incur the liability arising from an acceptance pure and simple, something more than styling himself heir in some written act, authentic or judicial, must appear in the instrument, in order to bind the party absolutely to pay all the debts of the succession out of his own means. Both in the express and tacit acceptance it must be made clear, that it was the intention of the party assuming the quality of heir to abide the disadvantages, if any should arise, of accepting simply and purely, as well as to enjoy the benefits that might accrue from it. In the one case, the intention is to be found in a fair interpretation of the terms and expressions of written instruments; in the other, it is to be inferred from acts, the motives of which can not be ascribed to any other purpose.

The subject matter of the written acts in which, by styling herself heir, it is contended in this case that the defendant became bound

SUCCESSION—Continued.

for the debts of the succession, presents collateral issues not involving the question of heirship, and in no manner relating to the acceptance of the succession.

The term *heir* has several significations. Sometimes it refers to one who has formally accepted a succession, and taken possession thereof; sometimes to one who is called to succeed, but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. Hence, the use of the word *heir* in itself is of but little moment. It is the *object and intent* manifested by its use that is the material thing.

Robinson Mumford v. Mrs. S. T. Bowman and Husband, 413.

2. This suit is instituted by the under tutor of the minor Kohn, to recover from S. Herman and L. Levy, the amount coming to them as heirs of their father in the property belonging to the partnership which had existed between their father and said Herman and Levy.

It is apparent from the record that the minors' interest in the succession of their father had not been handed over to their tutrix at the time she entered into another partnership with the surviving partners of her deceased husband. It was this interest, added to her rights as widow in community, which formed her share of the partnership stock. The contract was, in fact, a contract of partnership between herself, her minor children and the surviving partners of her husband. The law does not authorize such a partnership. It was an investment of her minor children's funds in an enterprise for which she had no warrant. Up to this point, therefore, the minors' property must be considered to have remained in the hands of the surviving partners.

But this court does not see where the under tutor finds any authority for attacking the defendants. If any cause of action exists against the defendants, the tutrix of the minors is the proper person to assert it.

The under tutor acts for the minor whenever the interest of the minor is in opposition to the interest of the tutor. Perhaps, in case of collusion between the debtor of a minor and his tutor, the under tutor might be authorized to interfere. But in this case no collusion is asserted. The rights of the minors have not been invaded by the defendants. Whatever transactions they may have had in which the minors' interests were involved, they had them with their tutrix, who was the only person having authority with whom they could contract. If they acted fraudulently toward the tutrix, fraud vitiates any contract, and the tutrix has her action to set it aside. If the tutrix has acted in bad faith towards her wards, the under tutor has his action against her.

Simon Netter, Under Tutor, v. S. Herman and L. Levy, 458.

SUCCESSION—Continued.

3. The plaintiff sold her interest in her father's succession to her co-legatee and consequently co-owner, who is the defendant in this case, and in the enjoyment of that interest it is not pretended that said defendant has been disturbed. It matters not whether that interest was a third or a half. The purchaser has received all that she purchased, to wit: the interest, whatever it is, and she must pay the price she has agreed to. It can not be seen under what error of law, as alleged, the defendant could have been, when making the purchase.

The plea of want of consideration is not well founded. The plaintiff did not sell any slave, but only whatever interest she might have in her father's estate. Besides, in 1867, the date of the defendant's purchase, there were no slaves to buy or to sell.

After the plaintiff sold all her interest in the succession of her father to the defendant, she had nothing to do with whatever debts of the succession the defendant chose, or was compelled to pay. There was no error in the judgment which passed over in silence the defendant's reconventional demand. To give judgment in favor of the plaintiff for the amount claimed, was practically to dismiss the reconventional demand—which dismissal the evidence justifies.

Margaret S. Pool v. Annie Alexander and Husband, 669.

SEE WIDOW, No. 1—*Cornelio McCoy and Husband v. McCoy, Administrator*, 686.

SEE PRACTICE, No. 8—*Minor v. Baker, Auctioneers et als.*, 160.

SEE HUSBAND AND WIFE, No. 2—*Anne Ford v. Anne Kittridge*, 190.

SEE ADMINISTRATOR, Nos. 6, 7, 8, 9—*Cushing et als. v. Herman-son et als.*, 214.

SEE ADMINISTRATOR, No. 10—*Succession of A. Decuir*, 222.

SEE ADMINISTRATOR, No. 11—*Louis Drouet v. Succession of L. F. Drouet*, 323.

SEE ADMINISTRATION, No. 19—*Rentz et als. v. Cole*, 623.

SEE JURISDICTION, No. 10—*Clemens v. Comfort*, 269.

SEE JURISDICTION, No. 20—*Tessier v. Littell*, 602.

SEE MONITION, No. 1—*Julia Scott and Husband v. The World*, 285.

SEE JUDGMENT, No. 7—*Taylor v. Lauer et al.*, 307.

SURETIES.

SEE PLEADINGS, No. 11—*Kilgore v. Tippit et als.*, 624.

SEE BONDS, No. 11—*Brigham v. Bussey et al.*, 676. No. 13—*Harrell v. Sanders*, 691.

TAXES AND TAX COLLECTORS.

1. The taxes of the years 1867 and 1868 became due at least by the first day of December of these years ; they were assessed respectively in the same years—the taxes for 1867 in 1867—those for 1868 in 1868.

Under the revenue act, approved April 4, 1865, numbered 55, and entitled “ An Act to provide for increasing the revenue of the State and raising the means to pay the interest on the State debt,” the lien and privilege for taxes dated from the first Monday of July of the year for which the taxes were assessed, and continued for two years.

But the revenue bill of 1868, approved on the twenty-sixth of October of that year, extended the continuance of the tax list to five years from the first of April of the year for which the taxes may be assessed. The last section of said act provides that it shall go into effect on the first day of January, 1869, and repeals, from and after its going into effect, all laws and parts of laws contrary to its provisions.

Dunlop & McCance v. Henry D. Minor et al—Edward O. Palmer, Third Opponent, 117.

2. It was competent for the Legislature to lengthen the term of prescription in regard to tax liens. The act of 1868 is not understood by the court as repealing the thirty-second section of the act of 1865, but only as extending the duration of the lien.

The question of prescripton must, in this case, be determined by the established rule for cases where a portion of the time to be computed has passed under one term of prescription, and the other portion has passed under another and a different term. According to this method, it is found that the lien for the taxes of 1867 is prescribed, while the lien for the taxes of 1868 is not prescribed. *Ibid.*

3. The defendant's objection is that the law under which the parish tax is levied on retail liquor dealers in the parish of East Feliciana, is violative of the one hundred and eighteenth article of the State Constitution, because the tax is not uniform, inasmuch as it is regulated by the amount of business which is done ; those who sell for more than \$15,000 having to pay one sum, and those who sell for less than \$15,000 and more than \$5,000, another sum, and so on. This objection is fatal.

Parish of East Feliciana ex rel. J. Oscar Howell, Tax Collector, v. John Gurth, 140.

4. Section 8 of act No. 47, of 1873, which disqualifies as a witness a delinquent taxpayer, published as such for thirty days, is unconstitutional.

This provision of the act under consideration is a regulation or rule

TAXES AND TAX COLLECTORS—Continued.

of evidence enacted by the Legislature. The title of the act should then give some indication of it, which it does not. No one upon reading that title would imagine that the act contained any provision upon the rules of evidence or the right to be a witness in a court of justice.

John I. Adams v. Asa Webster, 142.

5. The power delegated to police juries by the Legislature to levy taxes for parochial uses, and the special power to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax, is not unconstitutional.

State ex rel. J. O. Howell, Tax Collector, v. Charles McVea, 151.

6. The ordinance of the police jury of the parish of Concordia, which provides for the levying of a special tax to be known as a contingent tax, to be appropriated to the payment of all warrants drawn on the same for the payment of attorney's fees—any surplus to be held by the treasurer as a fund for the payment of miscellaneous warrants drawn on said fund, as might be thereafter provided by ordinances of the police jury relative to the same, is violative of the 2745th section of the Revised Statutes.

In so much as concerns the payment of attorney's contingent fees, it will be time to levy and collect a tax to pay the same when the contingency which may make them due, shall have arrived. The contingency may never happen, and there would then have been no necessity for collecting the tax.

Nathan Lorie v. Bennett Hitchcock, Tax Collector et al., 154.

7. The predecessors of the plaintiffs, who administered the offices of police jurors and parish treasurer during the years 1867, 1868, 1869, 1870, 1871 and 1872, had authority to settle with the defendant for parish taxes collected by him during those years. If they permitted him to settle without taking the oath required by law, that he had not speculated in parish funds, this fact can not invalidate the settlements, although it shows a dereliction of duty on the part of those administering the parish as a municipal corporation. These settlements are final.

P. A. Simmons, President Police Jury, and Charles Leroy, Treasurer, Parish of Natchitoches, v. D. H. Boullt, Tax Collector, 277.

8. After partial settlements made in April and May, 1873, for parish taxes collected during that year, defendant owing a certain balance thereof due up to the first of July of the same year, tendered it in parish warrants to the parish treasurer, who properly refused to receive them, because the tender was not accompanied with the oath required by law.

Failing to verify by his oath that the warrants tendered were actually

TAXES AND TAX COLLECTORS—Continued.

received by him from the taxpayers, the defendant should have tendered United States currency to the amount due by him.' *Ibid.*

9. A special tax having been levied and collected to pay judgments against the parish, plaintiffs claim judgment against defendant for the full amount thereof on the ground that, as tax collector, the defendant had no authority to pay the same to the judgment creditors, it being his duty to pay over all funds collected by himself for the parish to the parish treasurer, to be disbursed by that officer according to law.

There is no doubt that this was the duty of the defendant; but as he applied the sum aforesaid to the discharge of the judgments for which said sum was assessed and collected, this court fails to perceive any injury that has resulted to the parish from this irregular proceeding. It would be inequitable for the plaintiffs to recover judgment against the defendant for said amount; for, after all, the funds received their proper destination, though the channel through which they passed was not the right one. *Ibid.*

10. The collecting of certain rates fixed upon for the lease of a stall in St. Mary's Market, is not a tax upon plaintiff's occupation, which is unequal, oppressive and in violation of the constitution, It is a rent which he pays per day for the stall he occupies, besides a certain sum on each beef, sheep, etc., which he offers for sale. The ordinance was in force when he rented the stall; it is then a contract entered into between himself and the city, the performance of which he can not injoin the city from exacting.

Louis Barthel v. City of New Orleans, 340.

11. The plaintiff, not having tendered to the defendant the sum of money conceded to have been paid by the latter for taxes on certain property which she claims to be reconveyed to her, ought not to recover judgment against him for damages arising from his refusal to make the reconveyance to which plaintiff is entitled.

The claim of the intervenors predicated on the allegation that George, the husband of the plaintiff, bought the property which is sought to be made the object of the reconveyance, with money belonging to them, and which he employed for their benefit as their agent, can not be maintained. George was not the agent of the intervenors before the war of the rebellion, and was not acting as such at the time it occurred. They could not have appointed him afterwards, during the war, because they were citizens of Pennsylvania, a loyal State.

But whether the property in question was bought or not with the money of the intervenors is immaterial. If George had stolen the money from the intervenors, they could not have become the own-

TAXES AND TAX COLLECTORS—Continued.

ers of the property acquired therewith by him. Besides, they can not establish title to immovable property by parol, and they have no written evidence in support of their pretensions.

*Mrs. Elizabeth George, Widow and Tutrix v. Charles Campbell—
Magee & Kneass, Intercenors, 445.*

12. In this suit for the taxes of 1873, the defendant insists that the default, the introduction of proof and the judgment are irregular and void, because not taken in this particular suit, but in a general entry of, "City of New Orleans v. Samuel Boyd & Co., and sundry and other taxpayers, from No. 50,000 to 59,864 inclusive;" and that the judgment signed is not the judgment entered on the minutes.

The judgment appealed from, which has the signature of the judge, is the one which the defendant has an interest in complaining of. The next question is as to his having been legally cited.

By the act, No. 48 of 1871, § 9, a publication of the names of the delinquent taxpayers, with the amounts due by them respectively, in the official journal, is a legal citation to each. After a certain delay, "upon the production and filing of said claims or bills in the appropriate and competent court, and the production of proof of publication, judgment shall be immediately rendered in favor of said city and against the delinquent taxpayer or debtor." According to this provision of the law the taking of a default was unnecessary, and, if taken, the defendant has no right to complain of a formality which is in his favor.

City of New Orleans v. S. W. Rawlins, 470.

13. There is no sacramental form for entering judgments on the minutes of the court. The records of the court must show, however, the proceedings; and, in these tax suits, an entry showing that judgment was rendered in suits from one number to another inclusive, is a record of the fact that a judgment was allowed in each for the amount of the claim.

The record here shows that a judgment was entered and signed in the case of the city of New Orleans v. Rawlins, No. 57,679, which is a number included in those in which a judgment was entered on the minutes of the court. The law assimilates the proceedings in this class of cases to those in executory proceedings, except that the proof must be presented in court. *Ibid.*

14. From the proceedings in this case it appears that the order of the twelfth November, 1873, purporting to confirm and make final the judgment by default for taxes, was inadvertently rendered and was simply nugatory; and, being without force, it could not affect the validity of the judgment finally rendered contradictorily between the parties in December.

City of New Orleans v. Robert J. Ker, 491.

TAXES AND TAX COLLECTORS—Continued.

15. The ground that the assessors and city administrators were not legally appointed, can not be urged in this proceeding. There is a law providing for the settlement of such questions.

The objection that the parish tax, the school tax and the police tax embraced in the bill are for purposes of State institutions, and are unconstitutional, because not uniform, is without force.

The constitution does not require that every tax shall be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. The taxes now in question are local taxes, levied by the city in accordance with the statutes of the State, for the objects specified as applicable to the territorial limits of the city. *City of New Orleans v. Esther Klein*, 493.

16. The defendant is sued on a tax bill on real estate, which tax bill was originally two and five-eighths per cent. but subsequently reduced to two per cent. The defense is, that the ordinance under which this suit is instituted, is in violation of two prohibitory laws, to wit: Act No. 7, 1870, limiting plaintiff's right to tax to one and three quarters per cent. and act 68 of same year fixing the limit at two per cent., wherefore, said ordinance is null and void; the two acts were approved on the same day.

It is clear that the demand being only for two per cent. is not in violation of act 68.

But it is contended by defendant that the tax of two per cent. claimed being in excess of the authority conferred by act No. 7, limiting the taxing authority to one and three-quarters, can not be collected in whole or in part, while the plaintiff contends that the act No. 68, conferred the authority to collect the two per cent. claimed.

There is no absolute conflict between the two enactments. The first in order of the two acts is the City Charter, and confers on the City Council authority to levy an annual tax for the purposes of said act which should not exceed three-quarters of one per cent., *provided*, it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans. At the same time, there were other special statutes making it the duty of the city to levy and collect taxes known as the metropolitan tax and park tax, which are not mentioned in the designation of the taxes which, in the aggregate, should not exceed one and three-quarters per cent.

The act No. 68 need not be considered as a repealing or amending statute, but as fixing a limit in general terms to powers already conferred. If the city charter (act No. 7) were the only statute conferring authority to levy taxes, the defense set up might be

TAXES AND TAX COLLECTORS—Continued.

good, but the "proviso" in said act implies that a higher rate might be necessary.

There are many other statutes conferring the authority and making it the duty of the city to levy certain special taxes, which, all taken together, exceed two per cent. as made out in the original bill against the defendant; but the city has remitted that excess and is now only seeking to collect the two per cent. The city can well remit the excess and demand what it has authority to impose.

City of New Orleans v. Estate of D. F. Burthe, 497.

17. Act No. 57 of 1874, can have no effect in this case, which is to collect taxes in 1872 and 1873, as laws can not have a retroactive effect under the constitution of this State.

If the act of 1874 was to interpret the acts of 1871 and 1872, as seems to be its purpose, it is unconstitutional because trenching upon the jurisdiction of the judiciary. To interpret laws is not within the powers of the General Assembly. It is not a legislative, but a judicial function.

City of New Orleans v. Louisiana Mutual Insurance Company, 499.

18. The objection that the assessment of defendant's property is excessive, is a matter that can not be examined in the present action for the amount of his State taxes.

The Auditor merely calculates the proportion that each payer must pay. The discharge of this duty in no manner involves the levying of a tax by the Auditor. It is the State which levies the tax and not the Auditor.

The building of levees in Louisiana is a public enterprise or work which concerns directly at least half of the people of the State, and indirectly the whole State. Of the propriety of constructing levees the General Assembly is the exclusive judge. They have the right to assess a tax and expend the money arising therefrom in the construction of levees, or in the erection of such public works as they may deem beneficial. No individual taxpayer has the right to resist the exercise of a discretionary power confided to the Legislature.

The law making power can certainly assess a tax to pay the capital and interest of a debt which it had at the time authority to contract.

State of Louisiana v. A. A. Maginnis, 558.

19. The objection raised in this case, that acts No. 4 and 27 of the session of 1871, under which the assessments were made, are unconstitutional and void, and that it is a violation of article 10 of the constitution of this State and article 5, section 1, of the fourteenth amendment of the constitution of the United States to

TAXES AND TAX COLLECTORS—Continued.

attempt to impose upon the whole people of the State the burden of building and protecting levees for the benefit of the owners of property in a section of the State by way of taxation on the whole State, has become *res judicata* in the case of *State ex rel. Levee Company v. Charles Clinton, Auditor*, 25 An. 401.

It is no ground to resist a tax because the State debt has reached the constitutional limitation, unless the object for which the tax is levied or the law authorizing it is unconstitutional and void.

That the Legislature has improperly diverted a trust fund, is a question that may concern the owner or owners of that fund. It is a matter in which the respondent has no interest.

This court can not presume, in the absense of proof on the subject in the record, that the New Orleans, Mobile and Chattanooga Railroad Company has failed to fulfill the conditions on which the State has issued her bonds as an indorsement for said company, and that thereby the State is released from an obligation incurred before the adoption of the constitutional amendment limiting the State debt to twenty-five millions. *Ibid.*

20. The objection to the validity of the bonds issued under act 32, approved February 25, 1870, to pay for work on the levees of the State, has no force. Said act is not in conflict with articles 110 and 118 of the constitution of the United States.

The payment by the State in the form of bonds, for work on the levees of the State, is not taking private property, or divesting vested rights in the meaning of the constitution, State or federal. The question as to whether a tax shall be levied on all the taxable property of the State, or only on the particular localities where the work is done, is a question of policy to be determined by the Legislature and not by the courts, there being no constitutional regulation on the subject.

Whether the original proprietors were bound or not to keep up the levees, does not affect the power or right of the State to do so, and, in this proceeding, the court can not pass on the question of consideration if it be a matter for judicial inquiry.

Whether these were the necessary parties to institute a suit or not in this instance before the intervention of Sheridan, the holder of some of the bonds in question, it is quite sure that, after he intervened, to the extent of his interest in the bonds, there was a plaintiff in injunction, the State; and a defendant, Sheridan; and there was thus a joinder of issue.

The act No. 32, called in question, was approved on the twenty-fifth of February, 1870, about two months before the adoption of the constitutional amendment referred to. It is impossible therefore to imagine how that law can be affected by said amendment.

State of Louisiana v. Charles Clinton, Auditor, and A. Dubuclet, Treasurer. G. A. Sheridan, intervenor, 561.

TAXES AND TAX COLLECTORS—Continued.

21. The construction of levees can not be called a *local* work in Louisiana, but even should such a work be local in its character, there is no prohibition against the General Assembly authorizing local improvements to be made and providing for the payment thereof.

Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes and what does constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which can not be controlled by the courts, except perhaps when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.

If the theory of the plaintiff be correct, that the appropriations for levees and railroads are for private purposes and not legitimately the subjects for legislation, and therefore, that the debts created for such purposes are unconstitutional—a *fortiori* would bonds, issued in aid of the property banks of this State be void—and thus, all the bonded debt of the State, created during the last forty years, would be null and void. Courts, whose duty it is to deal with facts and laws, can not seriously be expected to adopt such vagaries.

No provision of the constitution has been cited, which forbade the State to contract the debt in question, and if there be none, as is believed to be the fact, the debt is valid. *Ibid.*

22. While the property seized for taxes, and the sale of which is enjoined, belonged to the former proprietor, W. J. Darden, no registry was necessary to preserve the privilege of the State for taxes due by him. But when the plaintiffs bought the property in 1872, it passed to them free of the privilege for taxes for the preceding years, because there was no registry of those tax claims. The subsequent registry could not fix on the purchasers an incumbrance which did not exist as to third persons, when the plaintiffs acquired the property.

John I. Adams & Co. v. Samuel Wakefield, Tax Collector, 592.

23. The plaintiff is a peddler or hawker, and was selling his wares in the parish of Richland. Whether he carried them in a pack, in his hand, or on a steamboat, matters nothing. However they were carried, the parish had the authority to demand the payment of a license for the sale thereof, and this without infringing upon the provisions of the constitution of the United States concerning the regulation of commerce.

Steamer Stella Block v. Parish of Richland et al., 642.

TAXES AND TAX COLLECTORS—Continued.

24. Section 25 of the charter of the city of Monroe, confers full authority on the city to assess and collect taxes and to impose penalties for non-payment of taxes. The grant of full power to tax carries with it authority to use all means necessary to accomplish the object; and the imposition of penalties after due notice for non-payment of taxes, is a legitimate means of collecting revenue. The State can confer this power because there is no limitation in the constitution inhibiting it.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution and void. The title of the charter is "An Act to incorporate the city of Monroe, to fix its boundaries, to provide for the government," etc. The statute would fail to provide for the government of the city of Monroe, if it failed to authorize the levy and collection of taxes for the support thereof.

A. L. Slack, Administrator, v. James S. Ray, Assessor and Collector, 674.

25. The assessment for revenue purposes consists in the descriptive lists and the valuation of property by the officers designated for that purpose, and if any discrepancy in the description of the property exist between the original lists and the copies furnished, the description in the original must control.

This court has no jurisdiction over the question of excessive taxation of property, after the delay given to taxpayers to correct their assessment has expired, if it ever has.

Inasmuch as the registry of the list of delinquent taxpayers was made before the recordation of the plaintiff's deed, he can not raise the question of registry, even if necessary to procure the right of preference in favor of the State.

Taxes are not debts in the ordinary sense of that word, but forced contributions for the support of the body politic, and it is competent for the sovereign to provide how these contributions shall be collected and to say whether the right of preference shall exist for the payment of the same, and for what length of time.

The right of taxation is one of the attributes of sovereignty, and the fundamental law of the State provides that it shall be equal and uniform and *ad valorem*. It is the property of the State which is to be taxed, and it is immaterial to the State whether it belongs to A or to B. As long as the tax is unpaid, the State has a right to exact it.

It is also competent for the State to make each and every piece of

TAXES AND TAX COLLECTORS—Continued.

property owned by any one, responsible for the whole amount of the taxes assessed to him—and such is in fact the law.

Thomas R. Geren v. E. H. Gruber, Tax Collector, 694.

26. The right of redemption accorded *ex gratia* must be exercised under the conditions imposed.

The constitutional objection that the penalties are being collected without due process of law, and that they can only be collected by hypothecary action, has no force. As there is no debt and no mortgage to enforce, the hypothecary action could not be maintained. Due process of law is provided in the statute on the subject. The same statute declares that the property is burdened with the taxes and a lien and privilege to secure the payment of the taxes, and that it will remain burdened into whatever hands it may pass.

There is no force in the objection that the amount of the penalties is not mentioned in the recorded list against the delinquent taxpayer. The penalties, like legal interest, are fixed by law.

The recordation of a description of the property of a delinquent taxpayer is the *mode of seizure* provided for by the statute.

The law maker did not contemplate the advertisement of the property before the seizure. It declares that the tax collector, on the fourth day of such recordation, may proceed to sell without (other) legal process, after advertising, etc., etc. The four days must be regarded as the days of grace allowed the delinquent before advertising his property for sale—corresponding to the delay accompanying notices of seizures. *Ibid.*

27. The plaintiff's purchase of certain lots from the original owner, as whose property they were assessed, could only have invested him with such rights as the original owner and delinquent taxpayer, and that was the right of redemption.

Not having offered to avail himself of the right of redemption under the conditions prescribed, the plaintiff had no interest or right to interfere by injunction with the proceeding of the tax collector.

The law authorizing one hundred per cent. damages for wrongfully enjoining the collection of taxes, does not apply when one, other than the person to whom the taxes are assessed, sues out the injunction, and the original taxpayer can only do it prior to the forfeiture. *Ibid.*

28. The plaintiff has enjoined defendant, tax collector, from selling certain lands seized for non-payment of taxes. He contends that the collector's authority does not extend to the sale of lands forfeited to the State as his were, under sections 66, 67 and 68 of article No. 42 of the acts of 1871. The plaintiff can not assume this position

TAXES AND TAX COLLECTORS—Continued.

without putting himself out of court, because, if his lands were forfeited to the State in pursuance of said act, the only right remaining to him is the right of redemption, under section 69 of said act, and until he chooses to exercise this right, he has no more interest in said lands than any other individual.

Besides, if the defendant has no authority to sell the lands forfeited to the State, no title will pass to the purchaser; there will be no change of ownership and the plaintiff can not be injured. But, on examination of the statutes, it is found that the tax collectors have authority to collect taxes on the delinquent lists, and for this purpose can sell the land forfeited to the State.

The implied contract of every citizen with the State, is to bear his share of the common burden of taxation for the support of the government. If he should fail to meet this obligation, there is no reason why he should not pay damages for breach thereof.

The law authorizing the forfeiture of the lands to the State after due notice has been given to the owner, and reserving to him the right of redemption on paying certain damages and costs, is regarded as a legitimate means employed by the State to collect her resources.

O. H. Morrison v. P. J. Larkin, Tax collector, 699.

29. Nothing is found in the law authorizing the forfeiture of the lands to the State for non-payment of taxes after due notice, repugnant to the articles of the State constitution relied on by plaintiff, nor is it in contravention of article one of the fourteenth amendment of the Constitution of the United States.

It is true that the special grant of authority in article 118 of the constitution, to the general assembly, "to exempt from taxation property actually used for churches, school or charitable purposes," carries with it implied inhibition against the exemption of property not actually used for church, school or charitable purposes. But, while those sections of the law and the special acts exempting property from taxation in contravention of the constitution, may be void, the other provisions of the law authorizing the levying and collecting of the taxes are valid and may be enforced.

If the exemptions complained of contravene the constitution, they are void, and such property under section 55 of act 42 of the acts of 1871, is liable to be assessed and taxed like all other property.

There is then no inequality of which the plaintiff can complain.

Section 8 of act 47 of the acts of 1873, prohibiting a delinquent taxpayer from bringing a suit or being a witness, is violative of article 114 of the constitution and void, the object of said section not being expressed in the letter of the law.

In regard to the one hundred per cent. damages for suing (section 3 of

TAXES AND TAX COLLECTORS—Continued.

article 47 of acts of 1873), that provision does not apply to a case like this, when lands have been forfeited to the State. *Ibid.*

30. The judgment appealed from in this case was not rendered without due process of law, as alleged. Publication of notice to the taxpayer, as provided by law, is the mode of citing delinquent taxpayers in the city of Shreveport, and that is due process. The Legislature has the power and discretion to regulate the manner of citing parties to appear before the courts of the State.

The title of the act incorporating the city of Shreveport is, "An Act to incorporate the city of Shreveport, define its limits and provide for its better police and municipal government." Taxes are necessary to "provide for the better police and municipal government" thereof, and germane to the objects indicated in the title of the law; and this satisfies the requirements of the constitution.

City of Shreveport v. J. W. Jones, 708.

31. The right of the Legislature to delegate the power of taxation for municipal purposes to a municipal corporation, and the right to allow the corporation to adopt rules for the collection of the same has already been decided affirmatively.

Prior to the day on which the sale of the property seized for tax was to take place, the delinquent taxpayer paid the tax, and enjoined the sale with regard to the penalty. The injunction improperly issued. After default the penalty was due as well as the amount of the tax and was equally exigible.

Louisa C. Bracey and Husband v. James S. Ray, Assessor and Collector, 710.

32. This is a suit for the payment of taxes and penalties. The judge *a quo* erred in including the \$2 25 allowed the collector, in the principal or amount of the taxes on which the penalties are calculated. This sum of \$2 25, composed of \$2 *for the suit* and 25 cents *for notice*, are simply costs and are not a part of the amount due the State.

In the *fiery facias* which, it seems, was prematurely issued, the clerk has incorrectly interpreted the judgment and issued execution for items not embraced in the judgment as rendered. The officers of the law, collector, clerk, sheriff and any others, can not be too careful in conforming to the exact provisions of the law in the discharge of their duties.

State of Louisiana v. The Eclipse Towboat Company, 716.

33. This suit having been brought in October, 1873, and the judgment rendered on the second October following, it was an error to allow a penalty, because until the fifteenth of December, 1873, the defendant was not a delinquent taxpayer for the year 1872.

TAXES AND TAX COLLECTORS—Continued.

That the defendant's property was not accurately described on the tax roll, is no reason why he should except to the suit, or escape the payment of his taxes to the State. The court *a qua* did not err in treating his exception as an answer and proceeding with the trial. The judge *a quo* erred when he permitted a witness at the trial to prove the contents of the tax roll in regard to the assessment of defendant's property, because the roll itself was the best evidence of the tax due by defendant.

State of Louisiana v. S. W. Edgar, 726.

34. Where the proceedings in a tax suit are against a person who is not the owner of the property taxed, the sale in which they eventuated, can not affect the title of the real owner. Besides, it is seldom that more glaring irregularities and defective proceedings in other respects are ever exhibited.

Mrs. C. Desormeaux, widow of S. B. Smith v. John Moylan, 730.

35. Where there is no note of evidence in the record, this court is bound to presume that the judge *a quo* did his duty and had sufficient proof before him to justify his decree.

The complaint that the judgment is \$2 25 in excess of the allegations of the petition is not well founded. It is claimed as due the tax collector; and under section 75 of act 42 of acts of 1871, it should be recovered against the defendant.

There is error in the judgment of the court below in allowing the penalty of twenty-five per cent. from the fifteenth of December, 1871. It can only run from the fifteenth of December, 1872, because until then the defendant was not in default for the taxes of 1871.

State of Louisiana v. A. De Monasterio, 734.

SEE LOCUS PUBLICUS, No. 2—*New Orleans Sugar Shed Company v. Harris*, 378.

TRANSFER OF PROPERTY.

1. The evidence in this case shows that the transfer, the legality of which is questioned, was not a sale, but a *giving in payment*; that, at the time, the transferrors were in insolvent circumstances, and that the transferees knew that fact. The transfer was evidently designed to give an unjust preference to the transferees.

The pretext that the plaintiffs were not injured by the transfer, because Homer, Rex & Tracey, the transferees, had a privilege on the property transferred, is untenable. There is no evidence in the record to establish a privilege in their favor, and there is testimony to show that they could not have had a privilege on a large portion of the property embraced in the act of transfer.

Charles De Greck & Co. v. Murphy & Gairns and Homer, Rex & Tracey, 296.

SEE LEASE, No. 2—*McCarthy v. Baze et al.*, 382.

SEE LAWS AND STATUTES, No. 12—*Taylor v. Twenty-five Bales of Cotton; Blackmore et al.*, 247.

TUTOR.

1. This is a suit to annul the judgment homologating the proceedings of a family meeting recommending, and the order appointing, defendant as the tutor of certain minors.

It was not incumbent on said defendant, in order to be appointed, to allege or show that there were no relatives of the minors in the State entitled to the tutorship.

It is the duty of the relatives residing within the parish of the judge who is to make the appointment, to apply to such judge within a given time, to have a tutor appointed when necessary. The plaintiff in this case, who alleges to be the grand mother of the minors, resides in the distant parish of Caddo, and there is no relative in the parish of the minors.

Any one may give information to the judge of the necessity for the appointment of a tutor, but it is not necessary for such person to show who are entitled to the tutorship. If there be such in the parish, they can apply for the appointment, or make opposition to any application.

The fact that the family meeting were not unanimous in recommending the defendant, may have been a ground for opposing the homologation of the proceedings, or for the convoking by the judge of another meeting, but it is not a ground for annulling the judgment of homologation or appointment.

The appointment of a tutor without bond is authorized upon the advice of a family meeting, when no one will take the tutorship and comply with the law requiring a bond. It is shown in this instance that the minors owned no property and that the defendant had charge of them for about seven years before any of their relatives claimed the tutorship.

The grand mother of the minors could, by timely proceeding, have procured the appointment to their tutorship in preference to the defendant, but the latter having been duly appointed, she can not urge such right as a ground for his removal or the annulment of his appointment. *Mary Markham v. Jacob J. Schardt*, 703.

SEE ADMINISTRATOR AND EXECUTOR.

UNITED STATES COLLECTOR OF CUSTOMS.

SEE PAYMENT, No. 1—*Snodgrass v. Adams*, 235.

UNITED STATES BRANCH MINT.

SEE NEW ORLEANS, No. 5—*Coleman v. City of New Orleans*, 451.

VENDOR AND VENDEE.

SEE PRIVILEGE, No. 6—*Stevens v. Pinneo et al.*, 617.

WALL IN COMMON.

1. This suit is for the payment of a wall designated as A, for the value of a wall designated as B, and damages for closing windows or apertures in wall A. When wall A was built with windows by Blasco, the owner of the contiguous lot refused to pay for the wall. The owner of that lot, however, could always have made the wall a wall in common by paying for the half of its costs.

Subsequently Blasco sold the lot to the plaintiff, with the windows still in existence, and plaintiff purchased from Burgunder said adjoining lot upon which the wall rested for half of its thickness. Some years after, the plaintiff sold to defendant the Burgunder lot, the windows continuing open in the wall and the deed remaining silent concerning them. This sale did not relieve the owner of the Burgundy lot from paying for the wall in common, whenever he might desire to use it.

The right which the original owner had to make the wall a wall in common by paying for it, passed with the lot to the vendee, but nothing more. The vendor of the defendant did not sell this wall, but only the lot which he had bought from Burgunder.

There can be no question of servitude in this case. The wall belonged to plaintiff in full ownership, until the owner of the contiguous lot should pay for the half of it, and this right would exist so long as that wall stood. When paid for, the owner of the contiguous lot became the joint owner of the common wall and could use it as owner. He could therefore close the windows in order to use the wall as a wall in common.

It is evidently in derogation of common right to permit a man to appropriate the land of another without paying for it. But the law provides a *quid pro quo* to the proprietor whose rights of property are thus invaded, by giving him the right always to make it a common wall by refunding one-half of the cost thereof.

Mrs. J. Lavergne, Tutrix et al., v. Mrs. Numa Lacoste, 507.

WIDOW.

1. When the amount allowed to a widow in necessitous circumstances is claimed, it must be clearly established that these circumstances existed at the time the suit was filed.

Cornelia McCoy and Husband v. Neely McCoy, Administrator, 686.

WILLS AND TESTAMENTS.

1. The language of the notary in the *proces verbal* of a will, "that the said testator, being illiterate, signs his mark," does not meet the requirements of article 1579 C. C., which prescribes that this declaration must be made by the testator himself.

WILLS AND TESTAMENTS—Continued.

In this instance, the testator has not declared that he knows not how to sign, nor has express mention of that declaration been made in the will. His testament is therefore null and void.

Succession of Caleb Whittington, 89.

2. Where it was urged, in contesting the validity of a will, that there is a distinction between domicile and residence, and the statement that the witnesses are domiciliated in this city, is not a compliance with the law which says, "witnesses residing in the place;"

Held—That this court is satisfied, that the notary used the word *domiciliated* as synonymous with *residing*, as it is, and without any consciousness of the legal distinction invoked by counsel.

In this instance an examination of the extracts of the will recited in the judgment, makes it manifest that, although said will is not artistically drawn, yet that the formalities mentioned in articles 1578, 1579 and 1580, R. C. C., are observed. There are no sacramental words prescribed by law.

Martin & Regget Rongger v. Katherine Kissinger, 338.

3. If words are used which, taken all together, show that the notary did all that the law makes essential, the will is good as to form, although the notary may be confused in his manner of expressing himself. The object of the law is to have it appear from the will itself, that the prescribed formalities have been observed. *Ibid.*
4. The statement that the witnesses were present and within hearing of the testator, all the time in which the will was written, taken in connection with the other statements, that it was written according to his dictation, (the testators), and that all was done without interruption *at one time*, must mean that the dictation, as well as the writing, was done in the presence of witnesses.

It would have been more clear and accurate if the notary had used the words: "*as dictated*" instead of "*according to his dictation*," but the latter expression, as used in this instance, means what the other does.

To adopt the construction contended for by counsel, would be refining a little more than the law does, and prescribing a fixed formula to be used by notaries, who all have their peculiar mode of expression. *Ibid.*

5. In this case it is shown that the heirs of George W. Johnson ratified and confirmed his will; that they were recognized and put in possession of their respective shares; that his succession has been fully administered; that the dispositions of the will were carried into execution as fully as it was possible, and that his executors have been discharged. After all these proceedings, and in the face

WILLS AND TESTAMENTS—Continued.

of these solemn acts, none of the heirs can now be heard, when they seek to annul the will in any of its parts.

Heirs of E. A. Johnson v. Bradish Johnson, 570.

SEE EVIDENCE, No. 7—*Boa v. Filleul*, 126.

SEE DONATIONS, No. 1, 2, 3—*Succession of Thomas Hale*, 195.

SEE JUDGMENT, No. 7—*Taylor v. Lauer et al.*, 307.

WITNESS.

1. A commission was issued to take the testimony of plaintiff, Mrs. E. LeBlanc, (Ernestine Chauveau), and her mother, then in France. This commission having been returned unexecuted, the defendant moved, *ex parte*, to take the answers for confessed, and the order was accordingly made.

This was clearly wrong. There is no law to authorize the testimony of a witness to be taken for confessed. These interrogatories on facts and articles were propounded to the plaintiff, who was then in France, but they were returned unanswered, as Mrs. LeBlanc had come back to Louisiana.

Thereupon the defendant filed a supplemental answer with interrogatories on facts and articles and asked that they be answered in open court. Objections were made to the interrogatories by the plaintiff's attorney—among others—that they were vague, impertinent and had nothing to do with the real issue in the cause.

The judge *a quo* sustained the objections, except as to the first question which was ordered to be answered. The ruling was correct. If she had failed to answer at all, she would have been protected, as the order did not fix a day on which she was to answer. But the plaintiff appeared in court and answered it.

The plaintiff having offered herself as a witness, the defendant objected to this, on the ground that her answers to interrogatories as a witness having been taken for confessed, she could not be permitted to testify. The judge properly overruled the objection. If the defendants really wanted her testimony, when she was upon the stand as a witness they might have obtained it, if responsive to the matters at issue.

Mrs. E. LeBlanc v. Succession of Charles Massieu, 332.

SEE WILLS AND TESTAMENTS No. 2, 3, 4—*Rongger v. Kissinger*, 338.

SEE EVIDENCE No. 4—*State v. Gaetano Rosa and Rosa Rosa*, 75.

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